FROM ACQUIESCENCE TO EXPECTATION:
THE RAMSDEN V DYSON PRINCIPLE TODAY

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Preface

Purpose

The purpose of this dissertation is to analyse and assess recent developments which have taken place in that area of law which was once referred to as "estoppel by acquiescence".

This head of equitable liability has now become referred to as the 'Ramsden v Dyson'[1]. principle, deriving its name from the decision of the House of Lords in that case, handed down in 1866. That decision served to confirm, but not to establish, the existence of this head of the equitable jurisdiction.

Motivation

This dissertation has been motivated by the obvious substantial revival which this principle has enjoyed in recent years. In particular the recent decisions of the English Court of Appeal in Crabb v Arun District Council,[2]. Amalgamated Investment and Property Co. Ltd. (in liquidation) v Texas Commerce International Bank Ltd.,[3]. and Habib Bank v Habib Bank AG Zurich Ltd.,[4]. have served not only to confirm the revival of the principle but to solidify changes in its orientation which began to become evident as early as the mid 1960's.

This reorientation of the Ramsden v Dyson principle was set in motion largely by the activity of Lord Denning M.R. and in particular in his judgments in Inwards v Baker[5]. and E.R. Ives Investments Ltd. v High[6].

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1. (1866) L.R. 1 H.L. 129.
2. [1976] 1 Ch. 179.
3. [1982] Q.B. 84.
4. [1981] 2 All E.R. 650.
5. [1965] 2 Q.B. 29.
6. [1967] 2 Q.B. 379.

Methodology

Although this head of law is ripe for restatement by the House of Lords as yet no definitive decision upon the Ramsden v Dyson principle has been handed down. There is thus no benchmark decision which can be used to assess the existing law. This has meant reliance upon a series of Court of Appeal decisions which, as yet, have not settled into a consistent pattern.

The methodology adopted here has thus been orthodox largely following a pathway laid by the cases. Limited attention has been paid to the historical development of the principle prior to the handing down of the decision in Ramsden v Dyson itself. This has been kept brief because of considerations of space and the relatively limited value of the very early decisions, individually, as foundations for the contemporary law.

Attention has then been focussed upon what appear as the essential ingredients of the principle as revealed by the decisions.

This has been followed by a consideration of the basis of the principle.

Finally attention has been directed to broader issues including the possible future development of the Ramsden v Dyson principle. This has necessarily involved a degree of conjecture.

No attempt has been made to set out a catalogue of cases. Although this could have been compelling in some areas, as for example in determining what amounts to adequate detriment, it was felt that little could be achieved by such an exercise. The courts have shown a clear propensity not to be limited by previous decisions in respect to such matters.

References

Throughout this work reference to the 'principle' means the principle confirmed by the House of Lords in Ramsden v Dyson.

The expression 'representor' is used to refer to the party who has made the required representation, and thereby raised an expectation, and against whom it is sought to raise the estoppel, that is the Ramsden v Dyson principle. Conversely the expression 'representee' is used to refer to the party who has suffered as a result of the expectation which has been raised by the representor, and who is, as a consequence, seeking to rely upon estoppel, that is the Ramsden v Dyson principle. These two expressions have been used in preference to plaintiff and defendant as being more precise in the context of this work.

CONTENTS

Cases

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Abstract

What is now referred to as the Ramsden v Dyson principle began life as nothing more than a bundle of instances in which equity would assert jurisdiction.

It experienced a period of systematisation in the later years of last century when attempts were made to encumber it with a series of rules.

In the middle years of the present century, with Lord Denning taking the lead, the Ramsden v Dyson principle quickly shed these rules and took on the wider function of providing the courts with a weapon whereby non contractual expectations may be fulfilled, or otherwise protected.

The basis upon which the courts determine whether the expectation will be fulfilled is whether or not it would be unconscionable to the representee to allow the expectation to remain unfulfilled. This will normally involve some degree of detriment to the representee if the representor is permitted to resile from the expectation which he has raised in the mind of the representee.

Thus in order to succeed in invoking the Ramsden v Dyson principle the representee has to show the existence of two basic requirements. Firstly, that the other party, the representor that is, has raised an expectation which would be such to influence a reasonable man. Secondly that it would be unconscionable for the expectation not to be fulfilled.

The present state of the law allows virtually a complete discretion to the courts as to when they will assert jurisdiction and as to the remedy which will be decreed. The remedy is not limited to a simple specific performance of the expectation.

The basis of the Ramsden v Dyson principle is barely distinguishable from that underlying other heads of estoppel such as the High Trees principle and the Dillwyn v Llewelyn principle.

With the departure of Lord Denning M.R. from the judicial scene a degree of momentum has apparently been removed from the development of the principle and there have been signs in some recent cases of attempts to limit the further development of the principle.

The method of investigation has been by orthodox case analysis with the division of the work following from the judicial decisions.

Chapter One

INTRODUCTION: STATEMENT OF THESIS

The Fundamental Question

The fundamental question which this dissertation seeks to answer is, 'in what circumstances will the law protect an expectation?'

The answer which is provided is 'when it would be unconscionable not to do so'.

The Ramsden v Dyson principle provides the courts with an effective weapon whereby expectations may be protected.

Statement of Thesis

The principle of equity confirmed by the decision of the House of Lords in Ramsden v Dyson[1]. began life, like many other equitable principles as a vague, ill defined, head of redress. In the later years of the nineteenth century attempts were made to systematise this principle by encumbering it with a series of rules. However decisions handed down from the middle years of the present century appear to have succeeded in freeing the principle from these rules and have enabled it to move towards a broad basis of unconscionability as the foundation for its application. This process has turned, what would have remained a narrow limited, principle of equity, confined, possibly only to transactions relating to real property, into a highly diffused and extremely flexible weapon, which can be judicially applied, in what now appears to be, an almost limitless number and variety of different situations.

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1. (1866) L.R. 1 H.L. 129.

From the mid 1960's until the present time the Ramsden v Dyson principle has been consistently applied by the courts in cases where it has been considered to be in the interests of justice that an expectation which has been raised by one party should be protected in the interests of the other party.

As the principle stands at present it thus has two fundamental ingredients. Firstly, one party, that is the representor, must raise an expectation. Secondly, the other party, that is the representee, must show that it would be unconscionable not for that expectation to be protected.

At the present stage of development the courts have assumed to themselves a virtually unlimited degree of discretion as to when the principle is applied. This discretion extends to the remedies which may be decreed when the principle is successfully pleaded.

Synopsis of Dissertation

The principle of equity confirmed by the House of Lords in Ramsden v Dyson, of which incidentally, that case, was not itself, an illustration, reinforced the right of action in cases when a party stood by and watched another act to his detriment. By the time of the handing down of the decision in Ramsden v Dyson this principle was already quite well established in equity. But that decision did serve to define and focus, albeit to a limited extent, what had previously been a very emphemeral concept by according it House of Lords precedent status and thus enabling it to assume a definite nomenclature. This head of equity is now generally referred to as the 'Ramsden v Dyson principle' But the decision of the House of Lords did not restate the existing law and, indeed, did not materially add to it; chapter two.

Recent decisions have seen an extension of the scope of the Ramsden v Dyson principle to such a degree that its outer parameters are now far from clear. It is now certain that the principle is not limited to situations with real property as their subject matter. It is also clear that it can operate in cases where the representation is, what could be described as amorphous. It is not limited to instances where silence alone is the only available form of representation. Moreover, it now appears that the Ramsden v Dyson principle can operate with the same degree of effectiveness against a right deriving from the common law as it can operate against a right that is entirely equitable in origin; chapter three.

Several attempts were made to limit this principle by encumbering it with a series of rules. That is, in particular, the probanda of Fry J. laid down in the decision of the Court of Appeal in Willmott v Barber, that a duty to speak was required to be shown as existing, by the representee, before the principle could be invoked, and that it was subject to the equitable concept of mutuality. These rules have been frequently used by counsel as defences against the application of the Ramsden v Dyson principle. The principle now appears to have successfully freed itself from all these constraints which could have been used to defeat its application; chapter four.

The limitation of the principle to merely a defence or a rule of evidence could also have dramatically limited the applicability of the principle. Although the matter does not appear to have been finally settled, and although the judicial dicta upon the matter may be described as uncertain, it now appears clear that the Ramsden v Dyson principle can operate as a cause of action; chapter five.

With an apparently limitless scope and freedom from constraints the courts began a search for a stable base upon which to reset the

Ramsden v Dyson principle. Led largely by Lord Denning M.R. they found this coherent base by resurrecting the old equitable concept of unconscionability. This concept is presently floating quite free, has no clearly discernible form, and is being applied, it appears, completely at the discretion of the courts; chapter six.

Unconscionability can now be seen as permeating every aspect of the application of the Ramsden v Dyson principle. In respect to the conduct required of the representor the concept of equitable fraud has been retained and there must be some element within the conduct of the representor to which equity can attach before it can assert jurisdiction in the Ramsden v Dyson principle. The contemporary cases would appear to indicate that primarily the courts are looking for the raising of an expectation by the representor in the mind of the representee. Most of the decisions handed down within the last twenty years can be seen as falling within this rubric. In this respect the state of knowledge of the representor can be a relevant factor which the court may, at its discretion, take into account. But it is now clear that the state of knowledge of the parties and also mistake and bad faith are not conclusive matters, in determining the equity, within themselves; chapter seven.

Likewise unconscionability will be taken into account by the court in its examination of the conduct of the representee. In order to call the Ramsden v Dyson principle into aid the representee must show that an equity has arisen in his favour, that is, that taking his position into account, it would be unconscionable for the representor to assert his rights and resile from the expectation which he has raised. This normally involves a requirement of some detriment to the representee. This is probably the most diffused and uncertain aspects of the principle; chapter eight.

Finally unconscionability is again evident in the satisfaction of the equity. The remedies flowing from the Ramsden v Dyson principle give the court an almost unlimited discretion as to how the unconscionability is rectified. In this respect the courts are not limited by any specific proprietary right deriving from the estoppel and there would appear to be an almost unlimited spectrum of remedies, ranging from an equitable lien to a transfer of the fee simple. Thus whatever remedy is deemed appropriate in the circumstances can be applied irrespective of whether that specific remedy was sought by the representee; chapter nine.

The Ramsden v Dyson principle can now be seen as providing the foundation stone for a vast edifice of estoppel which can be resorted to in order to rectify unconscionability in many different situations. The greatly increased scope of the principle which has become evident in recent years means that the principle would now be applied in instances where, previously, it was not regarded as appropriate. Thus many cases of estoppel by representation could probably now be brought within its confines. The principle laid down in Dillwyn v Llewelyn[2]. can now also be seen as but one specific aspect of the Ramsden v Dyson principle. Non contractual waiver could also be based upon the principle; chapter ten.

There are indications that in some recent decisions the limits of the principle may have appeared. It has been confirmed for example that the principle has limited effect against statutory authority. However it is not possible to ascertain, as yet, whether the Ramsden v Dyson principle has reached a period of decline, consolidation, or whether, after overcoming these jolts, it will continue to develop; chapter eleven.

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2. (1862) 4 De G.F. & J. 517; 45 E.R. 1285.

The emphasis upon unconscionability has not been without its associated problems. One of the most obvious of these is that counsel are now resorting not to precedent but to a wider ambit and more exhaustive analysis of the facts of cases in order to show the situation as unconscionable to their clients. This has proved very time consuming and has given rise to very closely reasoned judgments, which have obviously been shaped very largely by the submissions of counsel. It is possible that this may induce judges of the future to attempt to once again limit the scope of the Ramsden v Dyson principle by encasing it in rules so as to provide more precise guidelines as to its applicability. But at present it must be admitted that there is no indication of this and the principle can be said to be in full flood. Changing attitudes towards the redistribution of property rights by the courts could also have an effect upon the future of the Ramsden v Dyson principle; chapter twelve.

Terminology

The fact that terminology in this area of the law is quite unsettled posed a problem. Effective and settled terminology is an essential precondition to precise analysis.

The Ramsden v Dyson principle is most certainly a head of estoppel and is of equitable origin. However it is not satisfactority described simply as 'equitable estoppel' because of the need to differentiate it from other heads of estoppel of equitable origin and in particular that confirmed by the decision in Central London Property Trust Ltd. v High Trees House Ltd.[3]. Owing to its lack of precision,

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3. [1947] K.B. 130

therefore, the expression 'equitable estoppel' is not used in this work.

The expression 'proprietary estoppel' is being used with increasing frequency. But this expression is also not without problems because it implies estoppel giving rise to rights in respect to property. That head of estoppel confirmed in the decision in Ramsden-Dyson can give rise to proprietary rights but it is not limited to such rights.

The expression 'promissory estoppel' is also being used to refer to that head of estoppel confirmed in Central London Property Trust Ltd. v High Trees House Ltd. The expression 'promissory' could also be seen as applicable to those instances falling under the Ramsden v Dyson principle where the expectation derives from a specific promise, as well as to cases of common law estoppel deriving from a specific representation. The expression 'promissory estoppel' is not used in this work.

In an attempt therefore to avoid confusion the expression 'Ramsden v Dyson principle' has been used throughout this work.

Chapter Two

ORIGINS OF RAMSDEN V DYSON PRINCIPLE

Introduction: An Early Creation of Equity

An early creation of the courts of equity was the granting of redress in instances where one party has suffered loss as the result of another party merely standing by while that loss took place, or actively encouraging the loss.

This right of redress received the authority of the House of Lords in the decision handed down in Ramsden v Dyson[1]. but although that decision is sometimes regarded as the 'modern starting point of the law of equitable estoppel'[2]. there are clear examples of equity allowing redress in circumstances of acquiescence and, or, encouragement, dating back to the later years of the seventeenth century. These earlier authorities, are, now however, rarely cited.

The decision in Ramsden v Dyson is now generally regarded as the foundation statement of the equitable principle. It is significant in that it provided the maximum of precedent authority to the principle and it contains two well reasoned, if not invincible, statements of the principle which are frequently cited by the present day courts and used as a foundation stone for judgments. But apart from this the decision is not without its problems as a precedent. It was not, itself, an application of the principle because their Lordships there found against the raising of the necessary equity. Also the decision contained a short but highly significant dissenting speech by Lord Kingsdown. This contains a statement of the principle which is presently regarded at least by some, as a more accurate statement of the law than statements of the principle contained in the majority speeches.

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1. (1866) LR 1 HL 129.
2. As per Scarman LJ, as he then was, in Crabb v Arun District Council [1976] 1 Ch.179 at page 194 [1975] 3 All E.R. 865, at page 876.

Also the speeches in Ramsden v Dyson itself contain little by way of analysis of the existing precedents. They are rather devoted to an exhaustive examination of the facts and a statement of the inferences which would be dervied from those facts. Although this phenomena could be regarded as highly predictive of the future judicial history of this principle, the decision itself cannot be regarded as a restatement of the existing law.

Despite this, it is submitted that the decision warrants consideration because of the prominence which it has now received, and in particular because of its subsequent judicial history. The facts of Ramsden v Dyson itself also provide a classical example of the type of situation in which the principle can be applied.

The Equitable Background to the Principle

Although the House of Lords decision in Ramsden v Dyson is now generally accepted as the starting point of the modern law it is possible to discern the principle confirmed there in a number of much earlier decisions.

There can be no doubt as to the jurisdictional origins of the Ramsden v Dyson principle. Its roots lay deep within the mainstream of equity and its evolution is completely logical when viewed within its equitable ethos.

However unlike some other equitable principles[3]. that in Ramsden v Dyson does not appear to have sustained any clear systematisation in the early period of the nineteenth century[4]. The systematisation, if it came at all, appears to have taken place at the conclusion of the

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3. As e.g. the systematic classification of trusts, the rule against perpetuities, the doctrine of specific restitution.

4. The period of systematisation is generally taken to have extended from the Chancellorship of Lord Nottingham (1673 - 1682) to the time of the introduction of the Judicature Acts 1873 - 75 under the Chancellorship of the Earl of Selborne. But it is generally accepted to have reached its climax under the Chancellorship of Lord Eldon (1801 - 1806; 1807 - 1827).

century and especially with the attempts which were made to encase the principle in a rigid set of rules by Fry J. in Willmott v Barber.[5] The reason for this must remain a matter of conjecture.[6]

An examination of the very early decisions that appear to indicate the assertion of an equitable jurisdiction in this area reveals that they were determined essentially upon the traditional equitable concept of unconscionability. In those times there was, of course, very little in the way of precedent which could be relied upon.

A further feature of the early litigation is its very compelling factual base. Most of the decisions prior to this century hinged around the situation where the representee was allowed into possession of the land of the representor who later attempted to assert the title which he had at law and eject the tenant representee, in some cases, enriching himself by taking advantage of the improvements which the tenant had made in the expectation of a secure title. This was a situation which was ripe for equitable intervention. It represented a clear conflict between the legal rights of one person as against the equitable rights of another.

However a number of assumptions had to be satisfied before the representee could call equity into aid. Fundamental to the successful pleading of the Ramsden v Dyson principle, as indeed with any other equitable principle, was the raising of an equity in favour of the

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5. (1880) 15 Ch.D. 96. For discussion of the various attempts to encumber the principle with rules vide under "The Rise and Demise of Rules' Chapter four, infra.

6. It could have been that the Ramsden v Dyson principle did not sustain the degree of litigation which other equitable concepts attracted. It could have been owing to the fact that this principle appears to have taken a long time to disentangle itself from somewhat analogous but, by now at least, clearly distinct principles such as the doctrine of part performance in the law relating to contract;the equity to perfect a gift, that is the principle laid down in Dillwyn v Llewelyn (1862) 4 De G.E. & J. 517; 45 E.R. 1285. For discussion of this aspect vide infra, ibid chapter

representee. Unless the representee could show such an equity in his favour the legal rights of the representor prevailed. In order to raise the requisite equity in his favour the representee had to overcome the following assumptions. Firstly equity would not assist a mere gratuitous intervener. Any party who entered into the land of another and even improved the property of another, could not, simply by reason of that conduct, lay claim to a proprietary right or acquire an interest in that property. The legal rights of the owner prevailed.[7].

Secondly, in order to enable such a gratuitous intervener to relinquish that garb and be entitled to call equity into aid so as to enable him to obtain an interest in the property, and so prevent the legal owner from exercising his prior legal rights, he would have to show conduct on the part of the legal owner which was so unconscionable as to amount to what would be regarded as fraud. The fraud required in this particular instance was, of course, equitable fraud, and as such, was deliberately left open ended and was not clearly specified in the early decisions. But as time progressed and the precedents built up guidelines were laid down as to what was regarded by the courts of equity as unconscionable and this process reached a climax in the formulation of the probanda of Fry J. in Willmott v Barber[8].

Early Decisions Illustrating the Principle

One of the earliest recorded decisions which indicated the possibility of the assertion of equitable intervention in cases where a party suffered loss as the result of a mistaken belief in title and where the loss could have been prevented by the holder of the legal

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7. Confirmed in Pettitt v Pettitt [1970] A.C. 777 [1969] 2 All E.R. 385
8. (1880) 15 Ch.D 96 see under 'The Rise and Demise of Rules', chapter four, infra, for further discussion of the probanda of Fry J.

title appears to be the Earl of Oxford's Case[9]. of 1615. There lands were let to tenants upon titles which were not valid at law and the representor brought an action in ejectment to reclaim the lands after they had been considerably improved in value by the tenants. Redress was granted in equity in the form of a lien to cover the cost of the improvements which the tenants had made.

This early decision appears to have been aimed largely at the preventing of the representor taking advantage of the improvements which the tenants had made to the property and thus preventing the landlord from perpetrating what equity regarded as fraud.

The judgment obviously makes little reference to previous cases but is substantially based upon subjective notions of unconscionability and even refers to Holy Scripture.

But it was clear that equity would go further than merely decreeing a lien[10]. on the property in favour of the representee, and would allow quiet possession of buildings which had been erected by the representee in circumstances 'where a man has suffered another to go on with building upon his ground and not set up a right till afterwards when he was all the time conusant (sic) of his right and the person building had no notice of the other's right'.[11].

Indications are that by the time of East India Company v Vincent, decided in 1740 the action was well established and recognised in equity[12].

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9. (1615) 1 Ch. Rep 1; 21 E.R. 485. This celebrated decision is probably more notable for the conflict between the Courts of Common law and Chancery. The landlord had succeed in an action in ejectment and obtained judgment at law. The tenant then succeeded in an injunction in equity to prevent the execution of the judgment.

10. As was done in Unity Joint Stock Banking Association v King (1858), 25 Beav. 72; 53 E.R. 563.

11. Citation of Lord Hardwick in East India Company v Vincent (1740) 2 Alk. 83; 26 E.R. 451 at page 451.

12. Lord Hardwick said there are several instances '... in which the court would oblige the owner of the ground to permit the person building to enjoy it quietly and without distrubance', ibid.

That mere acquiescence may be sufficient conduct on the part of the representor to secure the equity was confirmed in Stiles v Cowper[13.] decided in 1748, where a landlord had continued to receive rent and allow building on land which was subject to an invalid lease, and later attempted to assert his legal title.

In 1802 Lord Eldon L.C. in Dann v Spurrier,[14.] after confirming the established cases and that merely 'looking on is in many cases as strong as using terms of encouragement'[15.] went on to point out that bad faith must be clearly established by the representee. The action in Dann v Spurrier failed because the conscience of the representor was not 'affected by the knowledge that is necessary to authorise the Court to apply the principle'.[16.] The tenant had there laid out expenditure on the mere expectation of a renewal of his lease and the landlord had no knowledge of such expenditure.[17.]

Summary of The Principle Before Ramsden v Dyson

As at the time of Ramsden v Dyson it can be said that a discernible but vaguely defined equity existed which could be called into aid to prevent loss or potential loss, where one party had either acquiesced in or encouraged another in the expectation of an interest in land, which in law did not exist and which the first party knew did not exist.

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13. (1748) 3 Atk. 692; 26 E.R. 1198.
14. (1802) 7 Ves. Jun 231 32 E.R. 94.
15. 32 E.R. at page 95
16. Ibid at page 96.
17. 'It must be shown, that with the knowledge of the person under whom he claims, he conceived he had that larger interest' ibid.

There was quite conclusive dicta to the effect that mere standing by would be sufficient conduct on the part of the representor although most of the decided cases went further than that and involved some degree of active encouragement on the part of the landlord representor. But the limits of the representor's conduct were not defined and in particular a major gap existed as to the circumstances in which acquiescence, in the absence of anything in support, would be sufficient conduct on the part of the representor.

It was clear that the equity could not be called into aid if the representee stood to suffer no loss by the representor asserting his legal title. There had to be some loss on the part of the representee if the other party was permitted to assert his legal title. This loss could be potential and was not limited to an actual loss. But the exact nature and limits of the requisite loss or detriment, were, like other aspects of the equity, left quite undefined by the early decisions.

Although the early decisions relate to real property there is nothing in them to indicate that the equity was so limited. Land was a frequent subject matter of litigation in early times, especially in the equitable jurisdiction. Also it was probably easier to show the existence of the equity and the requisite detrimental reliance in respect to real property than in the case of other assets. But there is nothing to indicate, in the early cases, that the principle was limited to where the detriment of the representee was visible in respect to the subject matter of the representation of the representor. At the same time the converse is equally true and there would appear to be nothing in the early decisions to prevent later courts from limiting the principle to representations involving land. It is probably true to say that having a stable base of real property assisted in the identification and development of this equity in its early stages.

By the time then of the decision in Ramsden v Dyson it would be fair to say that this equity was not so much a principle as simply one of the many bundles of instances in which equity would grant relief. The early cases did not therefore provide any barrier to the subsequent development of the law.

Unconscionability the Basis of the Early Decisions

Unconscionability is very clearly evident as the basis of the early decisions. Prior to the decision in Ramsden v Dyson we do not see this principle applied in accordance with rules. These were to emerge later.

Equitable fraud was an essential ingredient of unconscionability and the courts were quick to find the requisite fraud. In the very early decisions the fraud appears to have been seen by equity as resting in the possibility of the representor taking advantage of the value of the improvements which the representee had made to the property in the mistaken belief of title.

However, the later cases appear to go further and indicate a willingness to protect the representee in his possession of the interest, which the expectation created by the representor, had led him to believe that he had. He was thus able to call equity into aid to resist an action in ejectment by the landlord.

The concept of unconscionability was highly subjective. It was applied in a manner which can be described as robust in the extreme. The equity judges were clear in their mind as to what amounted to unconscionable behaviour. It was even acceptable to call upon Holy Scripture as a reinforcement for a finding. This is aptly illustrated by the decision of Lord Ellesmere in the Earl of Oxford's case;[18].

18. (1615) 1 Ch. Rep. 1.; 21 E.R. 485.

> 'By the law of God, He that builds a House ought to dwell in it; and he that plants a Vine yard ought to gather the Grapes thereof... Deut. 28. v 30. And yet here in this Case, such is the Conscience of the Doctor, the Defendant, That he would have the House, Gardens and Orchards which he neither built nor planted: but the Chancellors have always corrected such corrupt Consciences and caused them to render quid pro quo'[19].

It will be recalled that in that case the representor was attempting to take the benefit of the improvements to the property made by the representee tenant. This equity was not prepared to allow.

The expression 'estoppel' was not used in these early decisions. The chancery judges spoke of it as 'the raising of an equity'. Indeed such an expression is only a relatively recent innovation in describing the Ramsden v Dyson principle. It remains doubtful if the equity judges would have seen an analogy between the principle which they were developing and the principle of estoppel by representation which was developed by the courts of common law. But there can be no doubt as to the appropriateness of 'estoppel' as a description of the Ramsden v Dyson principle. Apart from substituting the raising of an expectation as required by equity, as against the existence of a specific representation, the ingredients of the Ramsden v Dyson principle are typical of estoppel in general.

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19. (1615) 1 Ch. Rep 5; 21 E.R. at page 486;

Facts and Proceedings of Ramsden v Dyson

The appellant, R, had inherited several blocks of land in Huddersfield under the will of his grandfather, Sir John Ramsden.

The second respondent, D, was the mortgagee of the first respondent Joseph Thornton, who was a tenant, in respect to two blocks of land, of the appellant's grandfather.

The estate had instituted a mode of leasing by entry of the tenants name in a rent role and fixing of, what in most instances amounted to a mere peppercorn rental, by an agent of the landlord. The leases were usually negotiated through this agent. Transfers were negotiated by notification to the agent who then duly removed one tenant from the rent role and substituted the name of the transferee as tenant.

This was a cheap but quite ineffective mode of conveyance. It had apparently been devised by the landlord as a method of assisting humble tenants in that it obviated the expense which would have been involved in drawing up formal deeds of leasehold. But the tenancies were, in fact, under parol agreements. The leases in dispute had been negotiated under this system. However not all leases concluded by the estate were under this system. It appears that the more affluent tenants negotiated formal leases upon a sixty year term.

Thornton had, upon an uncertain date, negotiated the lease of a block of land from the agent of the landlord, Sir John Ramsden, for which a ground rent of £4 per annum was set by the agent. He proceeded to lay out some £1,800 in building upon the land.

In June 1845 Thornton made application to the guardians (Sir John was by that time deceased) of the appellant for the lease of a further block of land agreeing to hold as tenant at will and to pay such rent as was fixed by the guardians.

This second lease was duly concluded at an annual ground rental of 1i 9s 7d and the name of the tenant duly entered upon the rent role.

In September 1857 Thornton negotiated a loan from the Commercial Inn Money Club, through its agent, D, and as security negotiated a mortgage of the second tenancy.

This involved a transfer of the leasehold to D. This transfer together with another for the occupation of D, were duly entered in the appellant's transfer book.

The point in issue before their Lordships were the terms under which Thornton held these two pieces of land. Were they merely tenancies at will or did they give the right to the tenant to call for a lease of sixty years, renewable every twenty years on the payment of the requisite fine.

Evidence was adduced to show that there existed a general belief among the tenants that the entry of a tenant's name on the rent role or in the transfer book entitled any tenant, at his pleasure, to call for the grant of a formal lease of sixty years.

In November 1861, in order to try the issue the landlord brought an action in ejectment.

In February 1862 Thornton and D filed a bill in response to this action in ejectment. The bill prayed that it might be declared that Thornton was entitled to have a formal lease granted or that he and D were entitled to a lien on the property in respect to money outlayed in improvements; that they would not be turned out of possession of the land without being repaid the moneys expended by Thornton on laying out the property and buildings on it; or such other compensation as the Court might think fit; that directions might be given to ascertain the amount of this compensation and that in the meantime the proceedings in ejectment might be stayed; and for farther relief.

In March 1864 the case was heard in Chancery before Stuart V.C. who made an order which declared that Thornton was entitled to have a lease or leases of the two pieces of land on the terms stated in the bill.

From this determination R appealed to the House of Lords.

Statement of Principle by Lord Cranworth

Speaking for the majority of the House of Lords Lord Cranworth set out the relevant head of equity which he regarded as necessary for the determination of Ramsden v Dyson as follows:

> 'If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he has expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented. But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger build on my land knowing it to be mine, there is no principle of equity which will prevent my claiming the land with benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights'[20].

It is not clear from this whether Lord Cranworth was purporting to make an exhaustive exposition of principle or whether he was merely accepting the existence of a much wider head of equitable intervention

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20. (1866) L.R. 1 H.L. 129, at pages 140-141.

and was adapting it to what he saw as the conditions necessary to apply it to the specific facts of the instant case. Lord Cranworth stated the principle in terms of 'a stranger building on my land' but he does not specifically limit the principle to the building on the land of another or, indeed, to situations with real property as their subject matter.

Central to the raising of the equity, in the view of Lord Cranworth is the state of knowledge of the parties. In his view it was essential that the representee be ignorant of the fact that he was building on the land of another and that the representor be fully cognizant of the facts as well as the legal position. Thus if Lord Cranworth's statement of the principle is adopted the subjective proof of this required state of knowledge could be a vital evidential factor in a court decision.

Two other ingredients given prominence by Lord Cranworth are, firstly, that a duty is placed upon the representor to speak, and thus prevent the detriment into which the representee is falling, and, secondly, that the representor should stand to profit by the mistake which he 'might have prevented'.

Lord Cranworth also took the opportunity to confirm the traditional equitable concept that there could be no assistance to a gratuitous intervener. That is the stranger who 'builds on my land knowing it to be mine'. He no doubt considered reference to a gratuitous intervener as important by way of analogy for it was the interposition of equity which could turn what would otherwise be a gratuitous intervener into a party entitled to raise the estoppel.

Perhaps the most unfortunate aspect of Lord Cranworth's statement of the principle is his limitation of it to 'a stranger'. What exactly was meant by this term is not spelt out. It could be taken to exclude from relief a party who had some prior relationship with the representor, such as a contractual relationship of landlord and tenant.

Statement of the Principle in The Dissenting Speech of Lord Kingsdown

Lord Kingsdown stated the principle as follows:

> 'The rule of law applicable to the case appears to me to be this; If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compell the landlord to give effect to such promise or expectation. This was the principle of the decision in Gregory v Mighell (1811) Ves. Jun. 328, and as I conceive, is open to no doubt.[21.]

No exception can be taken to the statement of Lord Kingsdown to the effect that the principle is 'open to no doubt' if it is seen as referring to the broad principle only. There would appear to be some doubt between himself and Lord Cranworth as to what is required to raise the equity. It could be that what Lord Cranworth stated as the appropriate conditions for its application are treated as subsumed sub silentio in the speech of Lord Kingsdown.

Lord Kingsdown stated the principle more broadly although in the narrower context of landlord and tenant. Here again this can be regarded as unfortunate, as it could well have arisen merely from the facts of the instant case, and show no limitation of the principle to the landlord and tenant situation.

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21. (1866) L.R. 1 H.L. 129, at page 170.

An essential difference between the two statements is that Lord Kingsdown's does not place the same degree of emphasis upon the state of knowledge of the parties. In this respect his approach appears to be more objective than that of Lord Cranworth. Rather he refers to the raising of 'an expectation, created or encouraged by the landlord'. So here, there is no specific requirement, at any rate in terms, that the landlord should know or intend that the expectation which he has created or encouraged is one to which he is under no obligation to give effect. In this view it would be sufficient to raise the equity if the reasonable effect of the conduct of the representor was to create or feed an expectation in the mind of the representee. The state of knowledge or the intention of the representor could be quite irrelevant to this raising of an expectation.

It would appear to be this aspect of the statement of Lord Kingsdown which is now proving so attractive to the contemporary courts.[22.]

A further significant distinction between the two statements is that while Lord Cranworth sees acquiescence as the basis of the action Lord Kingsdown provides for a wider based equity to include encouragement as well as acquiescence. This possible distinction was not developed by their Lordships but in at least one recent case has been seen as giving rise to two distinct principles.[23.]

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22. It was, for example, accepted by Danckwerts, L.J. in the Court of Appeal in E.R. Ives Investments Ltd. v High [1967] 2 Q.B. 379 at page 400, [1967] 1 All. E.R. 504 at page 511; by Lord Denning M.R. in Crabb v Arun District Council [1976] 1 Ch. 179 at page 188, [1975] 3. All. E.R. 865 at page 871, by Scarman L.J. in the same case, ibid at page 193 and page 876 respectively: by Oliver J. in the High Court in Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd [1982] 1 Q.B. 133n at page 148, [1981] 2 W.L.R. 576n at page 587.

23. See Robert Goff J. in Amalgamated Investment & Property Co. Ltd (in liquidation) v Texas Commerce International Bank Ltd. [1982] Q.B. 84 at page 103, [1981] 2. W.L.R. 554 at pages 569-570.

Finally Lord Kingsdown does not emphasise the fraudulent taking advantage of another's error as does Lord Cranworth. This omission would appear to confirm that Lord Kingsdown is perceiving a much wider more broadly based equity than Lord Cranworth.

The Dissent of Lord Kingsdown

The very brief dissenting speech of Lord Kingsdown is significant for two reasons. Firstly Lord Kingsdown in no way conflicts with the majority in respect to the actual principle of equity involved in the case. He fully recognises the right of equity to assert jurisdiction in appropriate cases where there has been building on the land of another. That is where a 'man under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord'[24]. takes possession of the, land with the consent of the landlord and lays out money.[25] To this extent the dissent of Lord Kingsdown does not amount to any derogation from the effectiveness of Ramsden v Dyson as a precedent for the assertion of jurisdiction in respect to the particular equity recognised in the case.

Secondly the dissenting speech is significant for highlighting the differences which can arise in respect to inferences which can be drawn from facts when the judicial process is applied to equitable principles of this nature. It would appear to be in this area that the basis of Lord Kingsdown's dissent rests. While fully accepting the principle of equity he rested his dissent upon 'the effect generally which the evidence produced in (his) mind'[26].

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24. (1866) L.R. 1 H.L. at page 170.
25. Relying upon Gregory v Mighell (1811) Ves. Jun. 328.
26. (1866) L.R. 1 H.L. at page 170.

The leading speech of Lord Cranworth emphasises that the tenant was fully aware of the extent of his interest in the property. The majority of the House of Lords focussed upon the legal rights which derived from the actual mode of conveyance, used here to create the tenancy in dispute, and point out that that was sufficient to give the tenant full knowledge of the extent of his interest in the land. In the view of Lord Cranworth the tenant representee did 'not thereby, in the absence of special circumstances acquire any right to prevent' [27]. the landlord from taking possession of the land and buildings when the tenancy had determined. Thornton, when he erected his buildings in 1837 did not believe that he had any absolute right against Sir John Ramsden to the lease he later claimed. Lord Cranworth devoted much of his speech to analysing the evidence as supporting this scenario.

The majority therefore, concerned themselves with the actual lease and the legal rights which derived from the lease and assume that that fixed the tenant representee with sufficient knowledge of his position, and that any future conduct of the representor, in raising an expectation which was contrary to the terms of the actual tenancy, was irrelevant. Lord Cranworth was prepared to construe the silence of the landlord not, as creating the impression of a long term tenancy in the mind of the tenant, but rather as representing a desire, on the part of the landlord, not to disturb the tenants, and to create in their minds the impression that 'they might rely on the honour of the (Ramsden) family that no such step as evicting them ... would ever be taken so long as they paid their rent'[28].

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27. (1866) L.R. 1 H.L. at page 141.

28. Ibid at page 146. Lord Cranworth appears to have been quite irritated with this '... new and cheap mode of conveyanceing which was certain, sooner or later, to involve difficulties' ibid at page 162.

The inference taken from the evidence by Lord Kingsdown was quite different. He paid attention to the conduct of the landlord in standing by, after the tenant had taken up possession of the land. He saw the non disturbance of the tenants in the meantime as merely pending the grant of a long term lease which the tenants had been assured that they might have whenever they required them.

Lord Kingsdown also paid considerable attention to the inferences to be derived from the use of the term 'tenants at will' and accepted the respondant representee's view that the term was used, not in a strict legal sense but merely to distinguish those who had formal leases from those who did not.

It could be argued that Lord Cranworth merely went further than Lord Kingsdown and spelt out the factual conditions which are necessary for the satisfaction of the equity while Lord Kingsdown has sub silentio accepted these. Lord Cranworth then going on to consider that the facts of the case do not show that these conditions have been satisfied. That is that the tenant took the lease with full knowledge of the actual terms of the tenancy which he held and that he improved the property fully aware of the limitations of his title.

Thus the dissent arose not upon the head of equity but upon the inferences to be drawn from the facts. In this respect the speeches in Ramsden v Dyson show the possibility of a difficulty which could be faced by future courts in applying this principle. If inferences from facts are to assume such a degree of importance then those facts, as well as the evidence upon which they are based, are going to be subject to ever increasing and minute analysis, by counsel, in order to throw up possible inferences in support of their client's case.

Analysis of the Principle Following the Decision in Ramsden v Dyson

The decision in Ramsden v Dyson did not greatly extend the pre-existing law. It can in no way be regarded as a restatement of the law. It does little more than confirm the existence of a vague head of equity to the effect that redress may be available in cases where a party has stood by while another has acted to his detriment. It did set out statements of the principle but, as has been indicated, these were, to some extent at least contradictory, and are not couched in general terms but are substantially limited to the instant facts.

In particular the problem of the situational limits of the principle remained unclear. Did the principle apply to situations apart from real property or was it confined to land transactions. More specifically was it confined to the building upon the property of another or to the landlord tenant situation? In Ramsden v Dyson there was a pre-existing contractual relationship, of sorts, between the representor and the representee, and indeed, this was a feature of most of the earlier cases, but we are not told whether the principle is so limited.

The specific conditions under which relief would be available under the principle were not settled by Ramsden v Dyson itself. In particular there is no indication of the nature or limits of the conduct required of the representor. Is his conduct limited to a mere standing by or can it include other acts? In his statement of the principle Lord Kingsdown hints at 'encouragement' as a possible basis of representor conduct upon which the principle may be set. It is not certain whether this is merely one aspect of some amorphous raft of conduct which will suffice to found the principle or whether it indicates the existence of a distinct heading of equity separate from that based upon acquiescence.

Lord Cranworth in his exposition of the principle, it will be recalled refers to 'the mistake which I might have prevented'[29]. and

29. (1866) L.R. I H.L. 129 at page 140.

this opens the problem of the state of knowledge required of the parties. He continues to lay down quite strict requirements as to the state of knowledge required of the parties. But the different approach of Lord Kingsdown to this issue leaves a very substantial gap because he tends to emphasise the raising of an 'expectation'. The two somewhat conflicting speeches thus serve to leave the entire problem of the state of knowledge required of the parties in abeyance.

At the same time Ramsden v Dyson itself reveals little as to the necessary conduct of the representee. Implicit in the decision is that the representee must stand to suffer some detriment before the principle can be invoked but the nature and form of this detriment is not made clear.

In concentrating upon the facts and the inferences to be derived from those facts their Lordships tend to ignore the fundamental basis of the principle. The statements of the principles which were laid down appear to hint more of a technical solution based upon specific rules rather than one based upon any broad conception of what amounts to unconscionable conduct. Indeed emphasis upon unconscionable conduct is rather conspicious by its absence. Whether unconscionability was accepted sub silentio as the legitimate basis of the Ramsden v Dyson principle, and the miscellaneous rules referred to as merely the conditions to satisfy that unconscionability, or, on the other hand, whether the rules themselves formed the substance of the principle, must remain a matter of conjecture.

A feature of the pleading in Ramsden v Dyson was the resort by counsel to precedent from what would now be considered as distinct and separate heads of liability in equity. At least one decision[30].

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30. Gregory v Mighell (1811) Ves. Jun. 238; 34 E.R. 341; dealing with the part performance of the terms of an agreement to lease.

quoted appears to rest upon the doctrine of part performance in the law of contract, while another[31] seems more appropriately considered as falling under the principle laid down in Dillwyn v Llewelyn,[32] that is the equity to perfect a gift. The failure to disengage these various heads of equity would tend to indicate that it was believed, at the time, that the equitable concepts underlying them were translatable from one to the other even if the circumstances in which the unconscionable conduct of the representor arose was different in each case.

Conclusion: Possible Lines of Development Left to Future Courts

Thus with the handing down of the decision in Ramsden v Dyson itself the principle which it most certainly confirmed was still left extremely open ended. It was left for the future courts to determine how the principle developed because the decision of the House of Lords left it subject to virtually no constraints.

Broadly speaking two quite distinct pathways presented themselves. Firstly there was the possibility of the approach which, as indicated, appears to be hinted at in the decision itself. This was what could be referred to as a 'pseudo contractual' approach. This would be an approach based upon rigidly prescribed rules, possibly seen as providing the test of the existence of a representation in the form of a promise, by one party, that is the representor, with equally rigid rules spelling out the requirement of some detriment on the part of the other party, that is the representee.

It will be shown that for some years the courts did tend to follow this quite rigid approach which could be regarded as orienting the Ramsden v Dyson principle away from equity and towards the common

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31. Surcome v Pinniger (1853) 3 De. G. McN. & G. 571; 43 E.R. 224.
32. (1862) 4 De G.G. & J. 517; 45 E.R. 1285.

law. This direction would have meant a very narrow principle, limited probably to real property and perhaps restricted to the landlord tenant situation or to the building upon the land of another. This would have meant a very inflexible weapon in the hands of the judiciary.

Secondly, it was equally apposite that the future development of the principle could have assumed a much braoder approach with much less emphasis upon rules. If the courts were to travel along this pathway in their application of the Ramsden v Dyson principle it is reasonable to assume that they would have been compelled to devise some basis with which to anchor the principle to counter the reduced emphasis upon rules. Had the rules been relinquished and nothing devised to fill the void left by the removal of the rules, the principle would have probably floated completely free with no indication as to when it was available.

This second, broader, approach is now very much in the ascendant and the courts have found, what appears to be a quite satisfactory anchor for the Ramsden v Dyson principle in a revival of the old equitable concept of unconscionability.

To some extent these two different approaches are implicit in the statements of the principle as set out by Lord Cranworth on the one hand and Lord Kingsdown on the other. The former providing for the narrow approach the latter for the broader.

The second approach would mean a much more flexible principle that could be used by the courts as a weapon to rectify unconscionability in a wide variety of different situations.

Attention is now directed to the process whereby the Ramsden v Dyson principle gradually shed itself of constraints and assumed its present guise.

SCOPE OF THE PRINCIPLE

Introduction: Possible Limitations.

The decision in Ramsden v Dyson itself left the scope of the principle virtually open. It was thus the prerogative of subsequent courts to determine where its outer parameters were to be finally set.

Several areas presented themselves as providing possible limitations upon the scope of the principle. The principle could have been limited in respect to the subject matter of the representation. The very early decisions were almost entirely concerned with land transactions, and in particular, improving the land of another, and there was nothing in the early cases to compel later courts to extend the Ramsden v Dyson principle beyond representations in respect to rights and interests in real property, or indeed even to beyond those relating to the improving of the property of another.

At the same time the courts could have curtailed the scope of the principle by limiting the nature of the representation required to be established by a representee. Again the parameters could have been set very strictly and the Ramsden v Dyson principle could well, for example, have been limited to those situations in which acquiescence alone, with nothing else by way of representation, had taken place. Other forms of representations, such as those made verbally or in writing, even when accompanied by acquiescence, could have served to exclude the pleading of the Ramsden v Dyson principle, and could have been left as the subject matter of other headings of estoppel.

The principle has now been extended to situations of convention that is where both the parties, possibly mistakenly, assume a specific state of affairs and proceed to act upon that basis. Recent decisions have shown that the party who seeks to resile from such an assumption can be met with the Ramsden v Dyson principle.

Finally the courts could have limited the principle within the equitable jurisdiction and held that it was not applicable to strike down rights of a legal nature. At the same time the courts could have made some limited moves in this direction and held for example, that it was more easy to destroy equitable rights by acquiescence than to destroy legal rights with the same weapon.

Although some tenuous moves have been made to constrain the Ramsden v Dyson principle in these directions, these appear now to have been quite effectively defeated. The courts have clearly indicated that they are now not prepared to limit the scope of the principle upon any of the bases set out above. Indeed there has been a quite remarkable freedom evident in the extent to which the courts have shown themselves ready to adapt the principle in virtually any direction. The passing of time has seen the Ramsden v Dyson principle pleaded in an increasing number of situations far removed from the factual situations of past centuries where it was nurtured. There has been no hesitation in applying the principle where it has been deemed appropriate to do so.

However a few indications as to possible limits on the principle have made an appearance in very recent cases and these have been reserved for discussion in a later chapter [1].

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1. 'The Limits of the Principle Make an Appearance' Chapter eleven infra.

The Ramsden v Dyson Principle is not Limited to Rights and Interests Created in and Over Land

An appropriate starting point for this discussion is the quite emphatic dicta of Megaw L.J. in Western Fish Products v Penwith District Council; [2].

> 'We know of no case, and none has been cited to us, in which the principle set out in Ramsden v Dyson ... has been applied otherwise than to rights and interests created in and over land. It may extend to other forms of property: ... In our judgment there is no good reason for extending the principle further. ... The creation of new rights and remedies is a matter for Parliament, not the judges.' [3].

With respect it will be shown that this view is not supported by the broad drift of the authorities, and that there is no clear theoretical reason why the Ramsden v Dyson principle should be so limited. In Western Fish Products v Penwith D.C. the representee had improved his own land following a representation from a council officer that he had the necessary planning authority. It was held that this did not give the requisite proprietary right to secure the Ramsden v Dyson principle as no expectation was raised in respect to the property of the representor.

2. [1981] 2 All E.R. 204.

3. ibid at page 218

While superficially the view might well appear quite appealing there can be no doubt that the Ramsden v Dyson principle is not limited to instances of rights and interests in respect to real property.

It is quite true that most of the early cases where the principle was successfully pleaded did have land as their subject matter. But it must be remembered that in those times little litigation where the principle was likely to be relevant reached the court of chancery apart from that involved with real property. Land transactions also probably did not provide the evidential difficulties which would have been faced in the case of other subject matters. At the same time the potential of the principle to operate as a blocking mechanism to other possible causes of action, such as that in tort, was probably not tried because the other rights of action were not fully developed. The fact that the early cases where the Ramsden v Dyson principle was successfully pleaded dealt almost exclusively with real property was therefore probably very largely fortuitous.

It is not denied that the principle can give rise to proprietary rights exclusive to real property [4]. but this is not conclusive proof that the principle cannot give rise to rights in respect to other subject matters of litigation and that it is exclusively reserved to land. [5].

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4. See under 'Remedies': Proprietary Rights Deriving From the Ramsden v Dyson Principle chapter nine infra.

5. As for example in Habib Bank Ltd v Habib Bank A.G. Zurich [1981] 1 W.L.R. 1265 [1981] 2 All E.R. 650 where the principle was successfully pleaded to resist an action in the tort of passing off.

There is, it must be admitted, some very weak judicial authority for the proposition that the principle is limited to land. Jordan C.J. in N.S.W. Trotting Club v Glebe Municipal Council [6] would have gone further and limited the principle not only to real property but to instances where improvements to the land of another had taken place. Jordan C.J. seemed to obviate the issue of whether or not the principle was limited to land by making a distinction as between the Ramsden v Dyson principle and a wider estoppel by acquiescence, and limiting only the former to land transactions. It is possible to derive some support for such a proposition from cases determined shortly after Ramsden v Dyson itself. De Bussche v Alt [7] decided by the Court of Appeal in 1878, clearly manifested a principle of acquiescence, made no reference to Ramsden v Dyson and was concerned with an agency agreement in respect to the sale of a vessel. Simm v Anglo American Telegraph Company [8] decided in 1879 by the Court of Appeal likewise made no reference to the principle and was concerned with estoppel against a company for the registration of a forged share certificate. But this does not prevent these cases from being examples of the same principle as that manifested in Ramsden v Dyson. [9]

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6. (1937) 37 S.R. (N.S.W.) 288.

7. (1878) 8 Ch. D. 286 C.A.

8. (1879) 5 Q.B.D. 188 C.A.

9. 'Another is where a man by his words or by his silence, or acquiescence, leads another to believe that he is not the owner and has no interest in the goods' per Lord Denning M.R. in Moorgate Mercantile v Twitchings [1976] Q.B. 225 [1975] 3 All E.R. 314 at pages 242 at page 322 respectively.

The principle can apply to personal property. But to submit as some writers have that 'there is no reason in principle to exclude it (the Ramsden v Dyson principle) from personality' [10]. is too restrictive. The contemporary cases clearly show that to limit the principle to property of any kind, real or personal is quite unrealistic.

Spencer-Bower and Turner clearly reflect the trend of the contemporary decisions on this matter;

> 'The rules as to estoppel by encouragement or acquiescence are not confined to cases of title to, encroachments upon, real property, though these cases undoubtly furnish the greatest variety of useful illustrations of the working of the doctrines ... the proposition ... is as applicable to transactions with respect to money as it is to transactions with respect to land' [11].

The contemporary decisions also do not appear to exhibit any clear propensity to limit the principle in respect to subject matter. Thus the universality of the principle was specifically upheld by Scarman L.J. in the Court of Appeal in Crabb v Arun District Council [12]. where, after referring to the dictum of Lord Kingsdown, in Ramsden v Dyson he went on, 'The statement of the law is put into the language of landlord and tenant because it was a landlord and tenant situation with which Lord Kingsdown was concerned: but it has been accepted as of general application' [13].

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10. Meagher R.P., W.M.C. Gummow and J.R.F. Lehane 'Equity Doctrines and Remedies' Sydney Butterworths of Australia Ltd, 1975. paragraph 1714 page 366. This work was published in 1975 and although the quote set out could possibly have been regarded as a legitimate statement of the law as at that time, subsequent cases referred to infra have clearly proved it much too restrictive as a statement of the scope of the Ramsden v Dyson principle.

11. Spencer-Bower G and Sir Alexander Turner (editor) 'The Law Relating to Estoppel by Representation' third edition London Butterworths 1977, paragraph 301 page 295.

12. [1976] 1 Ch. 179, [1975] 3 All E.R. 865.

13. ibid at page 194 and page 876 respectively.

Confirming this 'universality' of the principle we see its application in estopping an action in the tort of passing off; [14.] in estopping a company from denying the validity of a guarantee which it had given to a bank in respect to a loan made to its subsidiary; [15.] to enforcing the provisions of an option which was invalid because of non-registration under the Land Charges Act 1925. (U.K.) [16.]

It is clear that the Ramsden v Dyson principle is not limited to situations where land is the subject matter of the representation much less to situations where the improvement of the land of another is in dispute. It is equally lacking in realism to contend that the principle may extend to personality; it clearly extends much further. If there are any outer limits to the subject matter to which the principle is applicable then it is submitted that they have not, as yet, been determined by the courts. The present indications are that no limits, in this respect, will be set but that the universality of the Ramsden v Dyson principle will be maintained.

Some conjecture will reveal the difficulty which equity would have experienced in limiting the principle to real property and, in particular, to improvements to the land of another. For example, where improvements to property are made this is frequently in the expectation of the future exercise of a legal right over that property, such as the exercise of an option or the right of renewal of a lease. Once it has been established that the principle is available to enforce the terms of an option, albeit some might argue by back door means, in respect to real property, this logically leads to the application of the principle to enforce the provisions of options etc in respect to other transactions, such as the

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14. As in Habib Bank Ltd. v Habib Bank A.G. Zurich [1981] I W.L.R. 1265 [1981] 2 All E.R. 650.

15. As in Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank [1982] Q.B. 84. [1981] 3 All E.R. 577.

16. Taylors Fashions Ltd v Liverpool Victoria Trustees Co. Ltd [1982] Q.B. 133 [1981] 1 All E.R. 397, [1981] 2 W.L.R. 576 n.

renewal of a loan. Equity would, it is submitted, not find it easy to see a distinction between a representee improving the land of another, in the expectation of a proprietary right in that property, on the one hand, and a representee improving his own land in the expectation of obtaining a loan for the purpose of financing the improvements, when he has been led by the representor to believe that such a loan would be forthcoming.

Perhaps a more compelling reason for not limiting the equity to real property is that the court of chancery surely did not see its power to rectify unconscionable situations limited to real property. The right of equity to intervene was not limited to instances where the potential loss of the representee was limited to actions which visably related to the subject matter in dispute.

The Ramsden v Dyson Principle is Not Limited to Representations of Mere Acquiescence or Encouragement.

The facts of Ramsden v Dyson itself did not provide an example of estoppel upon the basis of what might be referred to as 'nude acquiescence'. It will be recalled that the tenant had, at least, been put into possession of the land, in dispute, by the representor landlord. Thereafter the landlord stood by while the representee improved the property in the expectation that he would be able to obtain a long term lease. This was not a case where the representee had mistakenly begun to improve the property of another and that other party had simply remained silent and quiescent and allowed the representee to continue acting to his detriment. Ramsden v Dyson did, however, raise the issue of estoppel by encouragement as well as or in addition to acquiescence and this will be considered later.

The two expressions 'acquiescence' and 'encouragement' were not defined in Ramsden v Dyson and it appears that they have not been the subject of any definitive judicial interpretation in later cases.

It is emphasised that very few instances are available in recent times of parties simply improving the land of another, in the mistaken belief of title, while the legal owner, in full possession of the facts merely stood by. The insignia of title as well as statutory provisions relating to encroachment are now so highly developed that such a situation is now unlikely to occur, or if it did happen, to result in litigation.

It is clear now that the Ramsden v Dyson principle is not limited to instances where acquiescence alone, or encouragement alone, or even the two in some manner of combination, has taken place. The principle will accommodate a much wider range of representations. It would appear that provided some element of acquiescence or encouragement is present any manner or number of other representations will not preclude the successful pleading of the Ramsden v Dyson principle.

This ready extension of the principle has, no doubt, been facilitated by the absence of any clearly developed head of estoppel based upon representations other than acquiescence. For example in many instances where specific representations have taken place we see the counsel and contemporary courts preferring to rely, if at all possible, upon the Ramsden v Dyson principle rather than to plead or assert any principle of estoppel based upon a clear assertion of fact. Thus in Crabb v Arun District Council [17]. the representor council had given a specific assurance to the representee landowner that he would have the required access. But the council then stood by while the landowner, acting to his detriment in reliance upon the expectation which the representor had created, sold some adjoining land, thus rendering himself completely reliant upon the right of way promised by the council. The Court of Appeal had no hesitation in applying the

17. [1976] Ch. 179 [1975] 3 All E.R. 865.

Ramsden v Dyson principle tending to ignore the existence of the point that the specific representations by the representor council could themselves have been the basis of estoppel.

Again in Habib Bank Ltd. v Habib Bank A.G. Zurich [18] which was an attempt to use estoppel to block an action in passing off the plaintiff representor bank had, in fact, given the defendant representee bank specific approval to use the name which the representor later complained of and attempted to make the subject of an action in tort in passing off. However no objection was taken by the representor of the use of the name 'Habib' for some four years between 1973 and 1977 and this was considered sufficient by the Court of Appeal to bring the action under the Ramsden v Dyson principle.

Extension of Ramsden v Dyson Principle to Situations of Convention

Probably an even more remarkable phenomenon is the extension of the principle into situations of 'convention'. This is where both parties operate upon the assumption that a certain state of affairs exists, such as, for example that there is a right to renew a lease or that an option is valid, [19] and when it is discovered that the shared assumption is invalid one party seeks to resile from it. It has been established that estoppel can operate in such instances and estoppel by convention is sometimes specified as a distinct heading. [20] Thus we see the Ramsden v Dyson principle being relied upon as the significant authority to secure estoppel in Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd. [21] where both parties assumed the validity of an option to renew a lease, and also in the High Court in Amalgamated Investment and Property

18. [1981] 1 W.L.R. 1265 [1981] 2 All E.R. 650.

19. Both parties could, for example, be bound by the terms of a contract which they have mutually misconstrued and acted upon.

20. See e.g. Chapter viii 'Estoppel by Convention' in Spencer-Bower and Turner op. cit.

21. [1982] Q.B. 133 [1981] 2 W.L.R. 576.

Co Ltd (in liquidation) v Texas Commerce International Bank, [22] where both parties operated upon the assumption that a guarantee of a loan was binding. Both of these cases clearly involved instances of convention. Significantly the Court of Appeal decision in the latter case makes no reference to the Ramsden v Dyson principle but relies more upon vague principles of convention with very substantial reliance upon quotes from Spencer-Bower and Turner. [23]

The extension of the Ramsden v Dyson principle into situations of convention is significant in demonstrating that the necessary element of unconscionability, and the consequent equity, need not rest only in the fact that the representor, by breaking his silence, could have prevented the loss of the representee. The move to convention clearly shows the Ramsden v Dyson principle extending still further into the arena of preventive justice. A very small step forward from allowing the principle in cases of convention is the elimination of mistake as being a vital factor in the representation. That is irrespective of of whether what the parties may have previously agreed was correct the principle will be available to prevent a party from resiling from a situation of mutual agreement when it would be unconscionable to the other party for him to do so. In other words the Ramsden v Dyson principle can be resorted to in order to prevent a potential loss.

Although it could be argued that the Ramsden v Dyson principle has been availed of to fill a void left by the lack of judicial development of other headings of estoppel, the cases cited, nonetheless appear to provide quite conclusive proof that the principle is not limited to

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22. [1982] Q.B. 84 [1981] 2 W.L.R. 554.

23. See the judgment of Eveleigh L.J. [1982] Q.B. 84 at page 126 and that of Brandon L.J. ibid at page 131. The dearth of judicial authority put forward in support of the heading of convention as an independant form of estoppel is highly significant.

instances of acquiescence alone but can clearly be applied successfully in other instances provided some element of acquiescence is present. This being so it would appear that situations of convention would usually provide the required acquiescence in that the essence of convention is that both parties mutually stand by while the other fulfills his side of the agreement.

In the High Court in Amalgamated Investment and Property Co. Ltd. v Texas Commerce International Bank Robert Goff J. referred back to the apparent distinction which had been made in Ramsden v Dyson between the principle enuciated by Lord Cranworth, resting apparently upon acquiescence, and that of Lord Kingsdown which appears 'to derive rather from encouragement or representation' [24]. He pointed out that the instant case clearly involved encouragement and representation and refused to make any clear distinction between these forms of representation as the basis of estoppel and acquiescence. He 'rejected an argument founded upon rigid categorisation' [25].

There would appear now to be a clear disinclination to be too concerned with the actual nature of the representation which is submitted as the basis of a pleading of the Ramsden v Dyson principle. The cases would appear to indicate that some element of acquiescence of encouragement must be present. It is also clear that relief under the principle is not debarred by the presence of direct representations in addition to elements of acquiescence or encouragement. There has been a definite reluctance to prescribe rules trammelling the representation. This leaves the door open to the evolution of a different basis for the conduct of the representor which gauges that conduct not so much by a series of predetermined rules but whether, in the circumstances, the conduct of the represntor has been

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24. [1982] Q.B. at page 103.

25. ibid.

unconscionable. This, as will subsequently be shown [26] requires a very broad overview of the actions of the representor.

The Ramsden v Dyson Principle in Equally Effective Against Legal As Against Equitable Rights.

When it is recalled that one of the fundamental basis of the equitable jursidiction was to grant relief where none was available at common law it may appear trite to argue that the Ramsden v Dyson principle is not available to strike down a common law right or that it is easier to establish a case of acquiescence where the right which it is sought to enforce is equitable only. If the intervention of equity was so limited its utility would surely be limited in the extreme. Despite this some submissions have apparently been made in recent cases to the effect that there is a distinction in the effectiveness of the Ramsden v Dyson principle as against common law rights on the one hand and equitable rights on the other. Moreover these submissions have found limited favour with the courts.

In Shaw v Applegate [27] it was sought to invoke the principle to strike down a convenant in a conveyance. [28] The Court of Appeal declined to apply acquiescence in that instant and proffered the view;

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26. See under 'The Raising of An Expectation; chapter seven infra.

27. [1977] 1 W.L.R. 970.

28. The convenant was to the effect that the land or any part of it should not be used as an 'amusement arcade' The assignees of the vendor had stood by for some five years and allowed the property to be used as an amusement arcade before attempting to enforce the convenant.

'It requires a very strong evidence to induce the Court to deprive a man of his legal right when he has expressly stipulated that he shall be bound only by a written document' [29].

It was conceded that it was easier to establish acquiescence in cases where it was sought to destroy equitable rights than where it was sought to destroy legal rights;

'For my part, I think it is easier to establish a case of acquiescence where the right is equitable only' [29a].

In Shaw v Applegate it was clearly a legal right which it was sought to defeat by acquiescence. The test which the Court set out in that case is quite consistent with that contained in the other recent decisions viz;

'The real test ... I think must be whether on the facts of the particular case the situation has become such that it would be dishonest, or unconscionable, for the plaintiff, or for the person having the right sought to be enforced, to continue to see to enforce it' [30].

and

'... the test is whether, in the circumstances, it has become unconscionable for the plaintiff to rely on his legal rights' [31].

Two propositions put forward by this dicta do not, with respect, appear to be tenable viewed in the light of other decisions. Firstly in making an apparent distinction as between estoppel as based upon

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29. As per Buckley L.J. [1977] I W.L.R. 970 at page 977 citing from Willmott v Barber (1880) 15 Ch. D. 96 at page 105.

29a. As per Robert Goff L.J. [1977] I W.L.R. 970 at page 979.

30. As per Buckley L.J. [1977] I W.L.R. 970 at page 978.

31. As per Robert Goff L.J. ibid at page 980.

acquiescence, that is as flowing from the Ramsden v Dyson principle and estoppel based upon other forms of representation, or indeed actions based upon other aspects of the equitable jurisdiction, the Court of Appeal seems to have been throwing up quite an artificial gloss. It is submitted that once the equity is shown to exist, as indeed the quotes set out above appear to indicate, no distinction can be drawn as between the effect of an estoppel based upon acquiescence as against any other base. The effect is the same.

Secondly, and more important for the purposes of our present discussion, the Ramsden v Dyson principle is, it is submitted, equally effective in its destruction of legal rights as against the destruction of equitable rights. Once it can be shown that 'it would be dishonest' or 'it has become unconscionable' the principle will destroy legal rights just as effectively as it will destroy equitable rights. This is aptly demonstrated by Pascoe v Turner [32.] and Crabb v Arun District Council [33.]

This broader view would appear to be supported by the more recent decision of the Court of Appeal in Habib Bank v Habib Bank A.G. Zurich [34.] where it was sought to invoke acquiescence, in conjunction with the other equitable heading of laches to defeat an action for the common law tort of passing off. In other words equitable devices were being used as defences to a common law action. Counsel sought to show that these devices only applied where an equitable right was being protected and apparently lengthly argument ensued as to 'whether a plaintiff in a passing off action is protecting a legal right or an equitable right' [35.]

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32. [1979] 2 All E.R. 945.

33. [1976] 1 Ch. 179, [1975] 3, W.L.R. 847, [1975] 3 All E.R. 865

34. [1981] 1 W.L.R. 1265, [1981] 2 All.E.R. 650.

35. ibid at page 1285 and page 666 respectively

This argument Oliver L.J. rejected and stated 'that such distinctions are both archaic and arcane' [36]. This would thus appear to confirm the ability of the Ramsden v Dyson principle to strike down legal rights in the same manner and to the same extent, that it can strike down equitable rights. Surely no other proposition is tenable. The ability of equity to over ride a statute has been confirmed beyond any dispute as instanced by the application of the doctrine of part performance in the law of contract. [37]. Also the power of the Ramsden v Dyson principle to create proprietary rights is not disputed. If weapons as powerful as statute and proprietary rights can fall before the Ramsden v Dyson principle then what rights can stand in its way?

Conclusion: The Scope of the Principle Still Extending

Subsequent to Ramsden v Dyson clear attempts have been made to extend the scope of the principle.

The principle is most certainly not limited to cases where real property is the subject matter in dispute. As yet no limits appear to have been set as to the subject matter. It would appear that the principle is equally applicable in transferring the legal title to property as in acting as a defence to a common law tort.

In similar manner it is now clear that the principle is applicable to behaviour by way of representation which although it may not have been envisaged by the earlier courts has now been accepted without demurrer. Thus it is no barrier to the successful pleading of the principle the specific representations have occurred in addition to acquiescence or encouragement. The Ramsden v Dyson principle is applicable in situations of convention.

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36 . ibid

37. However it must be admitted that the effectiveness of estoppel as a whole in the face of a statute is far from clear.

The principle is not confined to the destruction of rights which are specifically equitable in nature.

This obvious extention of the scope of the Ramsden v Dyson principle has served to provide one step towards the resurgence of unconscionability as the only basis of the principle. It has ensured that the principle remained free of limits which could have hindered its operation as a device to rectify unconscionable situations across a wide front.

In extending the scope of the principle the role of Lord Denning as compared with his brother judges can be readily seen. Thus in Amalgamated Investment & Property Co. Ltd. v Texas Commerce International Bank Ltd. he was prepared to determine the issue on the basis of whether or not it was unconscionable to deny relief while on the other hand Eveleigh and Brandon L. JJ. took the view that the issue was a classic case of estoppel by convention. They thus sought a basis for this finding within existing rules, which proved difficult.

The clear difference between the two approaches is that while unconscionability required little by way of justification and has little in the way of outer boundaries which can control the Ramsden v Dyson principle convention involves a more limited scope for expansion and was seen as bounded by clear rules.

Chapter Four

THE RISE AND DEMISE OF RULES

Introduction: Attempts to Systematise the Principle.

Over the years several attempts have been made to encumber the Ramsden v Dyson principle with a number of specific and clearly identifiable rules, which, had they been successful, would have served to spell out the circumstances in which the principle was applicable, and would thus have presented the representee with a series of barriers which he would have had to overcome in order to call the equity into aid. These rules can thus serve to act as defences against the application of the principle.

Although the remnants of these rules still frequently haunt the present application of the principle their limits and effect are now far from clear. However, had these rules been taken up, rigidly applied, and possibly developed further, by the contemporary courts, they could have had a very stultifying effect upon the applicability of the principle, and may even have resulted in it being rendered virtually inoperative. When these rules are pleaded today it is usually for the purpose of raising a defence against the application of the principle.

But the rules are still very much alive and the tendency of counsel to plead them continues, unabated. Their acceptance by the judiciary, however, is now much more circumspect and they have tended to be discarded by the courts in the face of the rise of unconscionability as a general basis for the application for the principle. Any rigid adherence by the courts to constraints attaching to the application of the principle could have limited its potential to operate as a device to rectify unconscionable situations. Thus the courts are tending to show an apparent degree of irritation with the pleading of these limitations on the principle.

The probanda laid down by the eminent Victorian Chancery Judge, Sir Edward Fry, in Willmott v Barber [1] were an attempt to set out a comprehensive code for the behaviour of the representee. The second requirement considered here is the possible obligation on the part of the representee to show that a duty to disclose rested upon the representor to break his silence, and that that duty had been broken. This like the probanda of Fry J. was of a specific nature.

Also there are some elusive indications to the effect that the equitable concept of mutuality could operate in respect to the application of the Ramsden v Dyson principle.

Unlike the other rules the proposition deriving, apparently from the decision of Bowen L.J. in the Court of Appeal in Low v Bouverie [2] to the effect that estoppel cannot operate as a cause of action, is of a much more ephemeral nature, concerning the overall application of the principle, if indeed it ever did apply to the principle.

Thus this rule, although like the others referred to here in being used as a defence, has been reserved for fuller consideration in the succeeding chapter.

Rules May Result in a Principle Becoming Detached From Its Base.

In the application of the judicial process there can be a tendency for rules, especially those which become firmly entrenched, to result in a principle becoming detached from its base. The courts may tend to apply the rules with the assumption that the application of the rules amounts to an end in itself. The fact that the rules may have been originally intended only as the manifestation of a particular principle of law, and

1. (1880) 15 Ch.D. 96.

2. (1891) 3 Ch. 82.

that they were not designed as an end in themselves, and that they must needs be adapted to specific circumstances, could well be lost sight of. Should such a process take place the original basis and purpose of a principle of law could well become lost in the rules.

There are some indications that such a process did occur in the administration of the Ramsden v Dyson principle. For example there are signs that the probanda of Fry J. in Willmott v Barber , in some cases, at least, had such an effect. This is indicated by instances where the probanda were applied without reference to any requirement of unconscionability and where there was no reference at all to the wider Ramsden v Dyson principle. [3.] In another case it was stated that 'The modern application of the doctrine (of proprietary estoppel) starts with Willmott v Barber' [4.] With respect such a proposition cannot be supported. Willmott v Barber merely formulated a series of rules for the application of the principle of law confirmed in Ramsden v Dyson.

Rules can thus be a convenient device whereby the courts can expand or restrict the scope of a principle. If there is a desire to expand the scope of the principle the rules can be lightly applied or even disregarded altogether in favour of a broader application of the basis of the principle. On the other hand should it be desired to restrict the scope of a principle the rules can be applied rigidly with even an indifference on the part of the courts as to what effect that rigid application may have upon the basis of the principle.

Thus in regard to the Ramsden v Dyson principle a potential conflict exists between the rules which have arisen and the basis of the principle, be that basis unconscionability or otherwise.

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3. As in Kammins Ballrooms Co. Ltd. v Zenith Investments (Torquay) Ltd [1971] A.C. 850, [1970] 3 W.L.R. 287, [1970] 2 All E.R. 871, H.L. (E). Adaras Developments Ltd v Marcona Corporation [1975] 1 N.Z.L.R. 324. Shaw v Applegate [1977] 1 W.L.R. 970, [1978] 1 All E.R. 123, C.A.

4. As per Jefferies J. in Beech v Beech (High Court Wellington, 24 February 1982 (A No. 144/80) Jefferies J. at page 11)

The Five Probanda Put Forward by Sir Edward Fry in Willmott v Barber.

According to Fry J. in Willmot v Barber, the requirements to be satisfied by the representee before he could rely upon acquiescence may be summarised as follows;

1. The representee must be mistaken as to his legal rights.
2. The representee must have expended money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief.
3. The representor must know of the existence of his own right which is inconsistent with the right claimed by the representee. Otherwise he is in the same position as the representee.
4. The representor must know of the representee's mistaken belief as to his rights. If he does not, there is nothing to call upon him to assert his rights.
5. Lastly, the representor, the possessor of the legal right, must have encouraged the representee in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal rights. [5.]

Willmott v Barber was yet a further case dealing with building upon the land of another. [6.] There the representee had taken a sublease, from a tenant whose lease, in fact, contained a convenant not to assign, and, with the knowledge of the landlord, proceeded to build upon the land. The action failed upon the ground that there was nothing to show that the landlord knew that the representee plaintiff had been acting in ignorance of his legal rights.

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5. Willmott v Barber (1880) 15 Ch.D. 96, at pages 105-196.

6. It is notable, however, that Fry J. does not limit his probanda to a real property situation but has framed them with the utmost generality.

This statement of principle has long been treated as classic and indispensable. But, be that as it may, it is very doubtful if Fry J. was aware of the precedent effect which his decision in Willmott v Barber was to have. Had he done so he may have spelt out in more detail the circumstances in which the probanda were to apply. In Willmott v Barber Fry J. appears to have been dealing with a situation of mere acquiescence. That is the representee was relying upon acquiescence alone with the only element of encouragement being the standing by of the landlord.

It appears clear that Fry J. was taking a very restrictive view of the doctrine of acquiescence [7]. and he appears to have been primarily concerned with sheeting home the requisite equitable fraud to enable the equity to be called into aid. Having confirmed that 'the equitable doctrine of acquiescence is founded on there having been a mistake of fact' [8]. he, later in the judgment, continues;

> 'It requires very strong evidence to induce the Court to deprive a man of his legal right when he has expressly stipulated that he shall be bound only by a written document. It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent to him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description?' [9].

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7. He appears to imply that the doctrine of acquiescence is of greater antiquity that the decision in Ramsden v Dyson, and indeed he does not refer to that decision in his judgment.

8. (1880) 15 Ch.D. at page 101.

9. ibid at page 105.

Fry J. then proceeds to spell out the probanda which precisely set the conditions necessary for the requisite fraud.

Fry J. was dealing with a situation of mere acquiescence and also where it could be construed that the parties had agreed to be bound by a written document, that was, a formal lease. It is not clear whether these requirements are necessary in situations where the representor has gone further than mere acquiescence as, for example, where he has actively encouraged the conduct of the representee. In fact in Willmott v Barber the landlord had given no encouragement, active, or passive.

The probanda clearly represent the most concerted attempt to spell out requirements for the application of the principle. They amount to a confirmation of the equitable background to the principle in clearly setting out the formula which will serve to turn what could amount to a mere gratuitous intervener into a representee deserving of the assistance of equity. At the same time they embody the nineteenth century attitude towards the protection of property rights in that a party may not be deprived of such rights unless and except in an extreme and clearly perceptible circumstance.

At the same time the probanda infused a very substantial subjective element into the application of the principle in requiring the determination of the state of knowledge of both the representor and representee. This could have meant that, had the probanda been rigidly applied by subsequent courts, the representee could have been presented with what, in many instances, would have amounted to an insuperable evidential hurdle. Fortunately for the future flexibility of the application of the principle and the potential of the courts to adapt it to rectify unconscionable situation, Fry J. did not spell out the scope of his probanda. This has given later courts a considerable degree of latitude in their approach to the probanda.

Probably because the probanda provide one of the most potentially effective defences against the application of the Ramsden v Dyson principle, they continue to be frequently cited both judicially and by counsel [10]. and considerable deference is still paid to them by the courts. But the issue remaining for resolution is whether or not the probanda are an essential ingredient in all cases where the Ramsden v Dyson principle is applied. On the other hand are they merely a gloss upon that principle, that is spelling out matters of fact which must be proved to establish the principle, or are they applicable only in limited circumstances? A definitive judicial statement of the precise role of the probanada has not recently been made despite the frequency with which they are cited. It is clear that it is not possible to agree with the view that 'The modern application of the doctrine (of proprietary estoppel) starts with Willmott v Barber' [11]. The probanda do not constitute the substance of the Ramsden v Dyson principle.

The prevailing judicial approach would tend, not it is admitted without some doubt, to the view that the probanda are applicable only in those instances where it is sought to rely upon silent acquiescence alone. That is in those instances where the representor, with full knowledge of all the facts, together with full knowledge of his legal rights, stands by and allows the representee to act to his detriment. That is where there is no conduct on the part of the representor apart from merely standing by with full possession of the facts. In such a case the probanda would provide an equitable test which is appropriate in cases of silent acquiescence, where a party who has remained inactive,

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10. See e.g. Adaras Developments Ltd v Marcona Corporation [1975] 1 N.Z.L.R. 324; Shaw and Another v Applegate (1978) 1 All E.R. 123; Beech v Beech (High Court Wellington 24 February 1982, (A. No 144/80) Jefferies J.) as well as the decisions referred to infra.

11. As per Jeffries J. in the High Court in Beech v Beech (High Court Wellington, 24 February 1982, (A No. 144/80) at page 11.

and is guilty of no representation or wrong, except remaining silent, is likely to be deprived of his property. Such being so it is reasonable to assume, that in those cases where it is appropriate, the probanda will be applied very strictly. However such cases are not now common.

Such an approach would be clearly in line with the current policy of the courts in maintaining flexibility in the Ramsden v Dyson principle in order to utilise it to rectify unconscionable situations. The rights of the representee could thus be nicely balanced against those of the representor by the court. But the courts now appear to have gone further in downgrading the probanda.

The probanda appeared to find very strong support from the House of Lords decision in Kamnins Ballrooms Co. Ltd. v Zenith Investments (Torquay) Ltd. [12.] where they were applied by Lord Diplock on the point that the representor was not possessed of the appropriate state of knowledge as required by the probanda. But that case was not, it must be admitted, a case of acquiescence alone as both parties had concluded an agreement as to the date of a hearing under the terms of a lease.

But that decision does not appear to have influenced subsequent courts in their application of the probanda. The more recent decisions clearly indicate a more limited applicability of the probanda. This was evident in Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. [13.] where in the seminol judgment Oliver J., as he then was, in the High Court took some time to consider this point. There the strict application of the probanda was down graded in favour of 'a much wider equitable jurisdiction to interfere in cases where the assertion of strict legal rights is found by the court to be unconscionable' [14.] Oliver J. who read the judgment of the Court continued;

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12. (1971) A.C. 850 at page 884.

13. [1982] 1 Q.B. 133, [1981] 2 W.L.R. 576

14. ibid at page 147 and page 589 respectively

'It may well be (although I think that this must now be considered open to doubt) that the strict Willmott v Barber ... probanda are applicable as necessary requirements in those cases where all that has happened is that the party alleged to be estoppel has stood by without protest while his rights have been infringed .... [15.]

Again where what is relied on is a waiver by acquiescence, as in Willmott v Barber itself, the five probanda are no doubt appropriate! [16.]

In Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. it was argued that it was essential to distinguish between estoppel by acquiescence on the one hand and estoppel by representation and promissory estoppel on the other. It was argued that in the former category it was necessary for the probanda to be satisifed.

But it must be admitted that it was difficult to exactly describe what the form of the estoppel was in that case. P 1 had there installed a lift in the belief that an option to renew was valid. In fact it was not valid because it was void for non registration. D did not know at the time the lift was installed that the option was void. Hence the third probandum was not satisfied.

The learned judge engaged in an extensive analysis of authorities and concluded that the probanda were not an indispensable condition. He also rejected a rigid classification of estoppel.

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15. ibid

16. [1982] 1 Q.B. 133, [1981] 2 W.L.R. 576 at page 147 and page 589 respectively.

The broad approach was specifically confirmed by Robert Goff J. in the High Court in Amalgamated Investment and Property Co. Ltd. (in liquidation) v Texas Commerce International Bank Ltd.[17].

But such an approach was also evident in earlier decisions.[18]. There have been some instances where the application of the probanda was merely not referred to as being, presumably, irrelevant.[19].

The issue received some further gloss by Oliver L.J. in the Court of Appeal in Habib Bank Ltd. v Habib Bank A.G. Zurich.[20]. where he cited with approval 'the test for a successful plea of acquiescence or estoppel, at any rate as the law has now developed'[21]. which was put forward by counsel for the defandants, viz;

> '... the validity of that defence must be tried upon principles subsequently equitable. Two circumstances always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice ...[22].

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17. [1982] 1 Q.B. 84 at page 104.

18. As e.g. in the earlier decision of the Court of Appeal in Hopgood v Brown [1955] 1 W.L.R. 213, where Evershed M.R. distinguished Willmott v Barber as applicable only in cases dealing with acquiescence; vide page 223: vide also Shaw v Applegate (1977) 1 W.L.R. 970 where the probanda were also downgraded in favour of a general test of unconscionability. The probanda were however, applied in Crabb v Arun District Council 1976 1 Ch.179, where, it is submitted they were irrelevant because the representee had representations, apart from silence which he could rely on.

19. As in Griffiths v Williams (1977) 248 E.G. 947. Pascoe v Turner [1979] 2 All E.R. 945.

20. [1981] 2 All E.R. 650.

21. ibid at page 665.

22. ibid at page 666 citing from the judgment of the Board in Lindsay Petroleum Co. v Hurd (1874) L.R. 5 P.C. 221 at pages 239-240. Although this refers to laches the Court presumably took this test as equally applicable to acquiescence.

This was in reply to counsel for the plaintiffs who argued that whether or not 'all five of those probanda are necessary or not ... 'to succeed the defendants must at least establish three things ... first that the defendants have been acting under a mistake as to their legal rights ... Second they must show that the plaintiffs encouraged that course of action .... Third they must show that they have acted on the plaintiffs' representation or encouragement to their detriment' [23].

The view of the courts now current would thus appear to be that the probanda are probably not necessary in all instances where the principle is pleaded. There would appear to be, as yet, no clear specification by the courts when, if at all, the probanda must be proved, either in part or in their entirety, before the representee can succeed. It is possible to conjecture that they could well be necessary with silence and passivity, alone, and the complete absence of any further conduct on the part of the representor. [24] But no case specifically in that particular straight jacket appears to have presented itself for litigation in recent years.

Generally, however, the probanda, despite the frequency with which they are still pleaded as a defence, appear to have been abandoned in favour of the general principle of assessing whether or not the situation is unconscionable as spelt out in Taylors Fashions. When it is recalled that the fundamental purport of the probanda was to do justice as between the representor and the representee this limited application of the probanda would appear to be perfectly legitimate. It is submitted that even in cases of silence where the probanda could not be satisfied, but that nonetheless there was sufficient fraud to render the situation unconscionable to the representee, there could be equitable intervention and the estoppel

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23. (1981) 2 All E.R. 650 at page 665

24. This appears to have been the situation in the instance of Willmott v Barber itself where 'the lessor was ignorant of his own rights, and there was nothing to shrew that he knew that the plaintiff had been acting in ignorance of his legal rights' (1880) 15 Ch.D. at page 97 (headnote).

could be available. It is clear that the courts will not allow the probanda to be raised as a defence so as to defeat the intervention of equity where such is deemed appropriate.

The Ramsden v Dyson principle itself [25.] thus appears to have become detached from the probanda of Fry J., at least to some extent. While there has clearly been a tendency to restrict the scope and operation of the probanda the principle itself has tended in the opposite direction and has widened in scope from its initial inception. It is now clear that, in the interests of rectifying unconscionable situations the application of the probanda is not essential in every case where the principle is pleaded.

As the law stands at present the probanda are therefore best regarded as an instrument which the courts may, at their discretion, apply in their assessment of the wider element of unconscionability.

No Indication of the Existence of a General Duty to Disclose.

The proposition that the principle will not be available unless the representee can prove that the representor was under a duty to disclose and that in remaining silent he consequently breached that duty, is theoretically very compelling indeed.

As the law has never been prone to render mere silence actionable it appears reasonable to hold that the representor is not obliged to break his silence unless it can be shown that he is under a duty so to do. If liability can be secured upon the basis of silence then surely there must be some compelling reason, recognised by the law, why that silence should be broken.

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25. The reservation is made that in Willmott v Barber Fry J. did not specifically allude to the Ramsden v Dyson principle and, indeed, does not refer to that case in his judgment. He was concerned rather with 'The Circumstances under which the owner of a legal right will be precluded by his acquiescence from asserting it ...' (1880) 15 Ch.D. at page 97 (headnote).

The classical exposition of the principle would appear to indicate the requirement of a duty to disclose. According to Lord Cranworth' ... when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wholly impassive on such an occasion' [26]. Exactly what Lord Cranworth is here alluding to is by no means clear. It could be that the 'duty' which he refers to is merely part of the wider aspect of unconscionable conduct which would be taken into account by equity. Be that as it may there was no elaboration of this point in Ramsden v Dyson itself. However much has been made of the requirement of a duty by subsequent courts and text writers.

Spencer-Bower and Turner are emphatic that a duty to disclose is an essential ingredient of liability under the principle and they proceed to rationalise that requirement of a duty to disclose;

> 'The main condition subject to which alone silence or inaction counts as a representation is that a legal (not a mere moral or social) duty shall have been owed by the representor to the representee to make the disclosure ... The theory is this. The parties to a transaction are entitled to assume ... that the other has fully discharged all such obligations of disclosure ...' [27].

With respect this is most unconvincing. There could well be no 'transaction' and indeed the whole substance of the Ramsden v Dyson principle is that it may operate in a situation where there is no transaction; no relationship, either of a contractual nature or otherwise between the parties. Moreover unless it can be shown that a fiduciary

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26. As per Lord Cranworth in Ramsden v Dyson (1866) L.R. 1 H.L. 129 at pages 140-141.

27. Spencer-Bower and Sir Alexander Turner 'The Law Relating to Estoppel by Representation' 3d. ed. London, Butterworths, 1977, paragraph 55.

relationship exists between the parties the law has traditionally shunned one party being required to disclose his position, or facts within his knowledge. It cannot be said that a fiduciary relationship operates in the circumstances of the Ramsden v Dyson principle.

Does the duty to disclose only extend to those instances where the representor is in full knowledge of his own rights and of the mistaken assumption of the representee? Does any required duty to disclose extends beyond the requisite state of knowledge? In other words, once the state of knowledge of the parties has been established, does the required duty to disclose follow automatically without the representee being called upon to prove anything further to establish it?

A conclusive decision upon the role of a possible duty to disclose does not seem to have presented itself recently, or indeed at all, but this aspect of the principle does appear to have received some support and to have played a major part in the finding against the representee in the New Zealand High Court in Adaras Developments v Marcona Corporation, [28] where o'Regan J., although citing Spencer-Bower and Turner, and considering the existence of such a duty essential, [29] did not elaborate upon its nature or extent. The judgment is thus of limited value in this respect. [30]

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28. [1975] 1 N.Z.L.R. 324.

29. 'No legal duty rested upon the plaintiff to speak in the circumstances which are put forward as the factual base to this submission and I accordingly reject the submission' per O'Regan J. [1975] 1 N.Z.L.R. at page 339.

    This is, in fact, enshrined into the headnote to the decision; '10 An estoppel in pais arises only where the person standing by (the representor) allows another person to act inconsistently with the representor's rights if the representor has a legal duty to disclose his own rights to that other person' [1975] 1 N.Z.L.R. at page 325.

30. Oliver J. in Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. [1982] 1 Q.B. 133 also made reference to the requirement of a duty '... in case of mere passivity, it is readily intelligible that there must be shown a duty to speak' ibid at page 147.

It would appear that upon theoretical grounds considerable difficulty arises in attempting to encumber the representor with a duty of disclosure such as to require him to break his silence. It is difficult to see what such a duty could legitimately be based upon. The mention of a duty to disclose immediately invites reference to the common law tort of negligence. But this analogy is not very fruitful for the simple reason that normally liability will not attach in negligence unless the duty of care is broken by the commission of some specific act on the part of the defendant. This could be sustained in those cases where the representor has made some specific representation which could clearly be ascribed as negligent, and which has induced the representee to act to his detriment. But it is not easy to sustain those instances where the only conduct of the representor is merely standing by and acquiescing.

At the same time, as indicated above, the fiduciary relationship is not readily translated to the Ramsden v Dyson situation. The principle is clearly much wider in scope that the somewhat limited situations which have become ascribed by law as relationships uberrimae fidei and thus requiring one party to divulge information, which is known to him, to the other party. The relationship as envisaged by the Ramsden v Dyson principle is not limited to one of the disparity of power or where one party is necessarily in a position to profit by making use of the property of another, or to take advantage of the other, possibly by way of catching a bargain. Indeed, the principle is wide enough to cover situations not only where the representor stands to profit, but also where the representee could suffer a potential loss through no fault of or profit to the representor. This tends to be the reverse of the fiduciary relationship. It is not easy to envisage one party being encumbered with a duty to speak in order to prevent loss to another where the party so encumbered is not standing to benefit at all and is in no way at fault.

It must be admitted, however, that it is possible to cite a long line of authority which superficially appears to indicate the requirement of a general duty to disclose. [31.] It is submitted that a closer examination of these authorities reveals that where a duty has been required by the courts some special prior relationship, usually of a contractual nature, has existed between the parties. A great many of the cases deal with the banker client relationship, as in Greenwood v Martin's Bank [32.] where the customer of the bank was estopped from recovering the amounts of cheques which the bank had paid upon the customer's signature which had been forged by his wife, because he was aware that his signature was being forged. It was held that the customer was under a duty to disclose the forgeries to the bank. [33.]

On the other hand reference must be made to West Country Cleaners v Saly [34.] where it was held that a landlord was under no duty to disclose to a tenant the breach of a covenant to paint, contained in the lease, meaning that the tenant lost the right of a renewal, as estoppel could not be raised against the landlord. It must be admitted that this decision is not easy to sustain especially since the landlord was aware of the terms of the lease. It appears at least to be an instance of waiver.

A strong case to the effect that a duty is necessary before the representee can succeed in pleading the Ramsden v Dyson principle has

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31. It is this long line of authority which appears to have been instrumental in convincing Spencer-Bower and Turner that a duty to disclose is a necessary ingredient.

32. [1933] A.C. 51; [1932] All E.R. Rep 318; and especially at pages 57 and 321 respectively.

33. See also the statement of Lord Sumner in the House of Lords in R.F. Jones v Waring and Gillow [1926] A.C. 670, where, at page 693, he specifies duty as the distinguishing feature in cases of the relationship between banker and customer and principal and agent. vide also London Joint Stock Bank v Macmillan [1918] A.C. 777, at page 836; also McKenzie v British Linen Company (1881) 6 App. Cas. 82.

34. [1966] 3 All E.R. 210.

been made from Moorgate Mercantile v Twitchings [35] which was a decision of the House of Lords. This case is cited as authority for the proposition by Spencer-Bower. [36] It is submitted that that case dealt not with the Ramsden v Dyson principle but a completely distinct head of estoppel and that is estoppel by negligence. Talk in that case is not of a duty to disclose but of a 'duty of care' as in Donoghue v Stevenson [37] and Hedley Byrne & Co. Ltd. v Heller & Partners Ltd. [38] The decision in Moorgate Mercantile is thus clearly distinguishable and provides, it is contended, no authority at all for the proposition that the breach of a general duty to disclose is an essential ingredient to the Ramsden v Dyson principle.

In conclusion it would appear not possible to discern the existence of a general duty to disclose which is specifically based upon the estoppel. In those instances where a duty has been found to be vital it will be seen as resting upon some distinct principle such as a contractual relationship, as in the case of banker and client, or as part of a wider ingredient of negligence, and not the Ramsden v Dyson principle, as a basis for the estoppel. Thus not only is it not easy to ascertain the nature and extent of any possible duty to disclose, it is not easy to determine any clear theoretical basis for it. In the absence of a clear formulation by the courts, as to the requirements of such a duty, and the actual nature and extent of it, there would appear to be little which can be obtained from further speculation upon this aspect of the Ramsden v Dyson principle.

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35. [1976] 1 Q.B. 225 C.A. [1977] A.C. 890 (H.L.(E.))

36. Spencer-Bower and Turner, op. cit. para 55 (footnote)

37. [1932] A.C. 562 (1932) All E.R. Rep 1 at page 11.

38. [1964] A.C. 465. Both these decisions were cited by Lord Salmon in Moorgate Mercantile v Twitchings (1977) A.C. 890 at page 908.

Mutuality: Reciprocity.

Although a defence of lack of mutuality would cut a substantial swath into the applicability of the principle such a defence would be fully in accord with the equitable tradition of maintaining an even hand as between the parties. Although nothing resembling a doctrine of lack of mutuality exists in respect to the application of the Ramsden v Dyson principle there are some shreds of authority to the effect, that in applying the principle, consideration will be given to the effect which that would be likely to have upon the representor, or that, where appropriate, the representee, where the principle is applied in his favour, may be compelled to undertake burdens which would, in the absence of the estoppel fall upon the representor.

Hints of the existence of such a defence could be derived from Ramsden v Dyson itself where Lord Cranworth said;

> '... another important observation ... is that the supposed right is one in which there is no reciprocity ... it is supposed that the landlord (representor) was continually making demises from year to year, with the knowledge that those who thus became his tenants supposed they acquired rights against him without his acquiring any corresponding rights against them' [39].

What this appears to be saying is that if the representee tenants are, by virtue of the operation of estoppel, given the right to call for long term leases, then the landlord should be given determinable rights of a reciprocal nature, as the landlord of the tenants. Although Ramsden v Dyson did involve a contractual situation it must be admitted that it is not easy to see the force of Lord Cranworth's remarks. It is surely not

39. (1866) L.R. 1 H.L. 129 at page 152.

possible to evolve in estoppel any concept of mutuality similar to that existing in the application of, for example, the remedy of specific performance in the law relating to contract. In that situation a mutuality of remedies was ensured and equity saw to it that the remedy would be equally available to the other side should either party fail to perform.[40] It is submitted that the essence of estoppel is not mutuality but the creation of an expectation in the mind of another because of a representation of some description and consequent detrimental reliance. The purpose of the Ramsden v Dyson principle is to rectify a situation of unconscionability; not to ensure that should the principle be invoked against one party reciprocal obligations will be available against the other party in every instance where the principle is applied.

However the dicta of Lord Cranworth found favour with Robert Goff J. in the High Court in Amalgamated Investment and Property Co. Ltd. (in liquidation) v Texas Commerce International Bank Ltd. where, in a flash of ingenuity, or desperation, counsel for the plaintiffs raised lack of reciprocity as a defence against the application of the Ramsden v Dyson principle. The availability of reciprocity as a general defence against the principle was conceded by Robert Goff J., but he found that it was inapplicable in the circumstances of the instant case. It will be recalled that the point in issue there was the use of the estoppel to prevent the plaintiffs from asserting the invalidity of a guarantee. It was argued that if this was allowed the plaintiffs would not obtain the benefit of subrogation rights associated with the guarantee. According to Robert Goff. J.;

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40. At common law, for example, equity would not award specific performance of a contract concluded with an infant upon the ground that the contract could not be enforced against the infant.

'... I can understand the force of such an argument in certain cases. No doubt, he who comes to equity must do equity; and it might well be contrary to principle that a party should, by virtue of the doctrine of equitable estoppel, obtain the benefit of rights without incurring the burden of corresponding obligations which he would have incurred if the rights had been enforceable without the aid of the doctrine of estoppel'.[41].

But he went on to point out that no 'further benefit would have accrued to the plaintiffs by virtue of such right of subrogation' and there was no reason why the bank should be precluded from relying upon the estoppel against the representor company.[42].

Perhaps the operative words in this dicta are 'contrary to principle' This would appear to indicate that this issue will be determined upon the basis of what is conscionable. There is no coherent doctrine of mutuality attaching to the Ramsden v Dyson principle and it would appear most unlikely that one would ever evolve. But it could well be that in some instances unconscionability would dictate that the principle could not be applied because of the effect which its application would have or be likely to have upon the representor. Equity would no doubt consider justice to the representor just as important as justice to the representee. It is reasonable to consider that the principle would not be available when to call it into aid would involve detriment to the representor which was not forseen by the representation. It clearly would be quite contrary to the very substance of the principle that a condition of its application was that it was equally available to both the parties in any specific circumstance.

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41. [1982] 1 Q.B. 84, [1981] 2 W.L.R. at page 109 and page 575 respectively.

42. A somewhat similar argument was put forward in Simm v Anglo-American Telegraph Co.(1879) 5 Q.B.D. 188, by Lord Bramwell at page 203. That instance, however, did not involve the Ramsden v Dyson principle but estoppel in respect to the issue of a share certificate. The cases cited here appear to be only the instances where lack of mutuality has been raised in the application of proprietary estoppel as a whole.

Conclusion. A "Principle 'Shorn of Limitations'

The courts are exhibiting a definite inclination to keeping the Ramsden v Dyson principle free from constraints, and especially those constraints which could operate as a defence against the application of the principle. In particular, the probanda of Fry J. in Willmott v Barber, the requirement of a duty to disclose, and the requirement of mutuality, have all, it appears, been relegated to the status of the principle itself in that they are not mandatory adjuncts to be rigidly applied in each instance where the Ramsden v Dyson principle is invoked, but are applicable at the discretion of the court. They can, it appears, be applied or ignored as the court sees fit. It is clear that the courts have at least at present no intention of allowing any rule to evolve which could serve to provide a watertight defence against the principle.

Thus the current judicial attitude towards these rules can be seen as fitting that of the application of the principle itself, and as being merely a part of the wider concept of maintaining the principle as flexible as possible so as to retain its potential as a device to rectify unconscionable situations. There can be no doubt that if the dictates of conscionability so demanded any of the rules here considered would be invoked by the court.

In the early years of their application there was some indication that the probanda of Fry., at least, could well be elevated to being an immutable requirement of the Ramsden v Dyson principle. Significantly, however, as time has progressed the attitude of the courts has become more fluid towards the application of the rules. None of them can now be taken as providing any of the substance of the Ramsden v Dyson principle. Rather they are merely a tool which the courts are free to avail themselves of in assessing the conscionability of a particular situation.

The Ramsden v Dyson principle can presently be aptly described as a general principle 'shorn of limitations' [43].

43. [1982] Q.B. 84 at page 122 [1981] 3 All E.R. 577 at page 584. as per Lord Denning M.R.

Chapter Five

THE RAMSDEN V DYSON PRINCIPLE AS A CAUSE OF ACTION

Introduction: Origins of View That Estoppel Not a Cause of Action

In the middle years of last century a view obtained currency that 'estoppel' was not available to a party as a cause of action but operated merely as a rule of evidence. That is it could operate as a defence against an action by another but it could not form the foundation upon which a party could take an action against another.

It can be realised that had such a proposition been able to obtain currency as a widely applied rule of law the value of estoppel would have been very much reduced as a weapon available to litigants. Had a litigant attempted to use the estoppel as a cause of action he could have immediately been met with the rebuttal that the law did not permit estoppel to be used in such a manner. This could have had a dramatic effect upon the development of estoppel in contemporary law.

It must be admitted that the courts paid little attention to specifying whether such a proposition applied to all categories of estoppel, including the Ramsden v Dyson principle, or whether it was limited in scope to certain types of estoppel. [1.]

The broad thrust of this discussion is that the view that estoppel in general and the Ramsden v Dyson principle, in particular, cannot operate as a cause of action is quite without any substantive foundation. The belief that estoppel is not a cause of action is a myth, and, moreover, even if such a view may have had some credence in respect to estoppel as a whole it was never applicable to that breed of estoppel which has become embodied in the Ramsden v Dyson principle.

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1. As for example that confirmed in High Trees House v Central London Property Trust [1947] K.B. 130

As authority for the proposition that estoppel cannot operate as a cause of action contemporary decisions usually rely upon dicta of Bowen L.J. in Low v Bouverie[2].

> 'Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said'[3].

It should be noted that Low v Bouverie was a case dealing not with acquiescence but with specific representations. In any event its force as precedent would appear to be somewhat tenuous. It would appear that the dicta in Low v Bouverie was an attempt to preserve in tact the decision in Derry v Peek[4]. to the effect that a representation which is inaccurate, but is made without fraud, is not actionable. This decision immediately threw a great deal of the law then current into confusion. In Low v Bouverie the plaintiff was proposing to lend money upon the security of a life interest in an estate. The trustee had disclosed some incumbrances on the trust fund but had forgotten about others with the result that the plaintiff loaned money upon the basis of a security which was insufficient. The court was thus faced with the problem of distinguishing Derry v Peek which had been determined only a few years before. Had estoppel been admitted as a cause of action so that a representation could be directly enforced, and the representation thus made good, or some other remedy, such as compensation been awarded, the substance would have been taken out of Derry v Peek. In order to effect a satisfactory distinguishing the court thus seized on the idea that estoppel was

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2. (1891) 3 Ch. 82.
3. (1891) 3 Ch. 82 at page 105
4. (1889) 14 App. Cas. 337.

not a cause of action.

Low v Bouverie was, of course, a case in equity, and the net result of it appears to have been to infuse into equity the rule that had long applied in the common law to the effect that a representation was, of itself, not directly enforceable. It overlooked the fact that equity had long enforced representations directly without the need for an attached cause of action.[5.]

Acceptance of view that Estoppel Not a Cause of Action

Whatever the propriety of the origins of the view that estoppel cannot operate as a cause of action may have been it found very ready acceptance both among the judges[6.] and the text

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5. See e.g. Burrowes v Lock (1805) 10 Ves. Jun. 470, a case on very similar facts to Low v Bouverie where the trustee was made accountable for the deficiency, also there is no hint in Jorden v Money (1854) 5 H.L.C. 185, to the effect that estoppel is limited to a rule of evidence, indeed had it been so limited in that case the plaintiff representee would have been out of court immediately.

6. See e.g.

> 'It is hardly a rule of what is called substantive law in the sense of declaring an immediate right or claim. It is rather a rule of evidence, capable none the less on that account of affecting gravely substantive rights'
> as per Viscount Haldane in London Joint Stock Bank v Macmillan (1918) A.C. 777 at page 818.
>
> '... estoppel is a rule of evidence that prevents the person estopped from denying the existence of a fact'
> as per Lord Wright in Evans v Bartlam (1937) 2 All E.R. 646 at page 653.
>
> '... this conclusion must follow from the circumstances that an estoppel is only a rule of evidence which under certain circumstances can be invoked by a party to an action'
> as per Lord Maughan in Maritime Electric Company v General Dairies Ltd (1937) 1 All E.R. 748 at page 754.

writers.[7.] In more recent times however there has been a very significant retreat from the view that estoppel cannot operate as a cause of action especially by the writers.[8.] Even so it still appears to find a place in pleadings and the matter cannot be regarded as finally settled. Judicially the matter is still far from settled.

Analysis of View that Estoppel Not a Cause of Action

Whether or not estoppel is limited to being a rule of evidence has not been subjected to any clear in depth analysis by the courts. What is meant by a 'cause of action'? In any successful action the plaintiff must prove firstly, that he has suffered loss, and secondly that that loss was the result of some act on the part of the defendant which is recognised in law as the basis for an action. Thus,

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7. See e.g.
> 'The doctrine of estoppel by representation forms part of the English law of evidence, and an estoppel, except as a bar to testimony, has no operation or efficacy whatsoever. Its sole effect is either to place an obstacle in the way of a case which might otherwise succeed. ... Emphatically, it is not a cause of action in itself, nor does it create one!

Spencer-Bower G. and Sir Alexander Turner 'The Law Relating to Estoppel by Representation' 3rd ed., London, Butterworths 1977, paragraph 8 page 10.

But, significantly, in specifically relating this rule to estoppel by acquiescence subsequent comment in the text would appear to water down considerably, if not contradict, the view that estoppel is not a cause of action. See e.g. ibid, page 13 paragraph 11.

8. Atiyah P.S. asks the question 'Why has this myth that estoppel is not a cause of action grown up 'Misrepresentation Warranty and Estoppel' (1971) 9 Alberta Law Review 347.

See also Jackson D. 'Estoppel as a Sword' (1965) 81 L.Q.R. 84, Thompson M.P. 'From Representation to Expectation: Estoppel as a Cause of Action' [1983] C.L.J. 257.

for example the cause of action could be fraud, negligence, misrepresentation or breach of contract. It is possible that the delusion that estoppel cannot operate as a cause of action obtained currency because of an emphasis upon the damage which the representee had suffered rather than upon the representation which is the basis of the complaint.

It is admitted that it is easy to see estoppel operating as a defence in cases of common law estoppel by representation and in the case of that particular breed of equitable estoppel manifested in the decision in Central London Property Trust Ltd. v High Trees House Ltd[9]. There estoppel is seen as a defence but this, it is submitted, is owing merely to the logistics of the particular situations in which estoppel may arise and not to any theoretical objection to it being extended to beyond being merely a defence or rule of evidence.

In those instances where there is a specific representation the representor will, by the operation of estoppel, be precluded from denying the truth of his representation. That is the representee is suing not upon the basis of a misrepresentation but upon the assumption that the assertion which has been made is, in fact, accurate. Thus the court in allowing the estoppel requires the parties to assume the accuracy of the representation. Irrespective of the situation in fact the representee is afforded, by the court, the remedy of affirming the representation, that is treating the representation as true and then claiming whatever relief would be appropriate upon the assumption that the representation were true.[10]

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9. [1947] 1 K.B. 130

10. To this extent the remedy of estoppel has some analogy with that of specific performance in contract in requiring the representor to make good what he had represented.

That is estoppel provides a defence by preventing the proof of a particular fact.

This scenario could, it is admitted, be adapted to the situation of silence on the part of the representor. In a situation relying upon the Ramsden v Dyson principle the representor by his silence can be seen as, in effect, representing that a specific state of affairs exists, and the effect of the estoppel is thus to later preclude him from denying that such a state of affairs does not, in fact, exist. It could well be argued that if estoppel, in instances where the Ramsden v Dyson principle is pleaded, does require the existence of an independant cause of action, then that can be found in the fraud of the representor in not breaking his silence in order to disabuse the representee of his mistake.

But this is tenuous reasoning as in many instances it is difficult in cases where the Ramsden v Dyson principle is successfully pleaded to see any obvious cause of action apart from acquiescence.

It may be possible to argue that if any cause of action exists in cases where the doctrine of acquiescence is applied then that cause of action exists only in equity and that it is possible that the particular set of circumstances would have given rise to equitable relief in any event, and that it is coincidental that they would also support an estoppel. It is no doubt true that acquiescence could give rise to other equitable remedies such as the creation of a constructive trust. Such an argument could well be valid but it is submitted that it does not detract from the proposition that acquiescence can operate as a cause of action. A litigant is surely not concerned whether or not his action lies in common law or in equity, it is the reality of the remedy which matters to him.

Moreover, even if estoppel cannot operate as a cause of action there can be no doubt that the Ramsden v. Dyson principle, at least can give rise to proprietary rights and to the granting by the court of a substantive remedy. It is submitted that these characteristics of the principle are not incidental to it being a rule of evidence, but to its being a substantive rule of law.

This process has now been taken by the courts to the extent of enabling the principle to vest a full legal title.[11.]

Also there can be no doubt of the ability of the principle to give rise to a substantive remedy as, for example, injunction,[12.] damages[13.] or compensation.[14.]

This characteristic of the principle which enables it to transfer an effect title to property, or to give rise to a substantive remedy, would tend to confirm its potential as a cause of action. If a rule of evidence, or a mere defence, can have the effect of transferring property rights then it can surely be described as a rule of evidence with quite extraordinary effects.

The Ramsden v Dyson principle is thus much more aggressive in its thrust than other heads of estoppel.

The issue of the scope of estoppel to operate as a cause of action and whether, in this regard the Ramsden v Dyson principle

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11. As in Pascoe v Turner [1979] 1 W.L.R. 431, where the defendant representee who was relying upon the estoppel, that is the Dillwyn v Llewelyn principle, to defend an action in ejectment succeeded in obtaining the full legal title.

12. As in Crabb v Arun District Council (1976) 1 Ch 179, also Shaw and Another v Applegate (1977) 1 W.L.R. 970.

13. As in Shaw v Applegate (supra)

14. As was recognised by Oliver J. in Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd (1982) 1 Q.B. 133 at page 148.

differs from other heads has not been settled by the pleadings which have taken place in recent cases and the consequent confusion which has followed.

Very few instances are available in recent years of the proposition that the principle cannot operate as a cause of action forming the clear ratio of a decision. But one such does appear to be the decision of Beattie J. in the High Court of New Zealand in Webb v Blenheim Council[15]. where although the principle was not directly pleaded, acquiescence was relevant. There a piece of land on a street front in a business area, was offered to the Council for sale but the Council did not respond. Later the Council sealed and land and later still attempted to lay gas pipes without the permission of the plaintiff who then sued in trespass. In reply the Council raised estoppel based upon the fact that the plaintiff had allowed the Council to enter and seal the property in dispute. Beattie J. in finding for the plaintiff representor used as a basis for his decision the belief that 'the Council endeavours to invoke a rule of evidence to found a cause of action'[16]. By this Beattie J. presumably meant that by raising the estoppel as a defence the Council was obtaining some proprietary right in the land which it had earlier refused to purchase outright. With respect the judicial statement in respect to estoppel operating as a cause of action was unfortunate.

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15. [1975] 1 N.Z.L.R. 57

16. [1975] 1 N.Z.L.R. 57 at page 62

Contemporary Decisions Still Leave Confusion

The matter has not been settled by dicta of Brandon L.J. in the later case, in the Court of Appeal, in Amalgamated Investment & Property Co. Ltd. (in liquidation) v Texas Commerce International Bank Ltd.[17]. where the Ramsden v Dyson principle was directly in issue. These dicta can be seen as nothing but a gloss upon one limited aspect of the issue of the principle clearing the way for an action. The appellant company had directly pleaded the point that the representee bank was here seeking to rely upon estoppel, that is the Ramsden v Dyson principle as a cause of action. This submission was disposed of by Brandon L.J.;

> 'I turn to the second argument advanced on behalf of AIP, that the bank is here seeking to use estoppel as a sword rather than a shield, and that is something which the law of estoppel does not permit. Another way in which the argument is put is that a party cannot found a cause of action on an estoppel.
>
> In my view much of the language used in connection with these concepts is no more than a matter of semantics. Let me consider the present case and suppose that the bank had brought an action against AIP before it went into liquidation to recover moneys owed by ANPP to Portsoken. In the statement of claim in such an action the bank would have pleaded the contract of loan incorporating the guarantee, and averred that, on the true construction of the guarantee, AIP was bound to discharge the debts owed by ANPP to Portsoken.

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17. [1982] Q.B. 84 [1981] 3 All E.R. 577

> By their defence AIP would have pleaded that, on the true construction of the guarantee, AIP was only bound to discharge debts owed by ANPP to the bank, and not debts owed by ANPP to Portsoken. Then in their reply the bank would have pleaded that, by reason of an estoppel arising from the matters discussed above, AIP were precluded from questioning the interpretation of the guarantee which both parties had, for the purposes of the transactions between them, assumed to be true'[18].

Thus in this particular instance the defendant bank was able to use the estoppel as a shield in that the estoppel prevented the plaintiff investment company from denying the validity of the guarantee but at the same time the bank was also able, by virtue of the estoppel, raised against the investment company, to enforce the terms of the guarantee against it. Had it not been possible to raise the estoppel the guarantee would not have been enforceable.

Brandon L.J. continued;

> 'This illustrates what I would regard as the true proposition of law, that, while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel he would necessarily have failed'[19].

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18. [1982] 1 Q.B. 84 [1981] 3 All E.R. 577 at page 131 and page 591 respectively

19. Ibid.

But Eveleigh L.J. in the same case is probably even more emphatic that estoppel cannot operate as a cause of action "An assumption is not to be treated as having the effect of an assumpsit".

Webster J. adopted a similar view in Pacol Ltd. v Trade Lines Ltd.[20]. In that case the defendants D1 were estopped from denying that they were parties to a charter party, when in fact they were not, because their actions had caused P to allow the limitation period to expire against D2 and also to induce them not to check Lloyd's Register of Shipping in order to ascertain who was the shipowner. Webster J. held, applying Taylors Fashions Ltd v Liverpool Trustees Co. Ltd. that D1 were estopped from denying that they were parties to the contract. He stated that estoppel operated as a rule of evidence, to preclude D1 from relying on the fact that they were not a party to the contract.

But surely here in these two cases we see the operation of estoppel as a cause of action. Is not an agreed assumption of facts in effect the creation of an agreement at law? Also surely it is a question of fact whether one party is bound to another. This appears to be taking estoppel as a shield much too far. In Amalgamated Investment v Texas Commerce Bank agreement was in fact created by the estoppel where but for the estoppel it would not have existed. Parties were bound where but for the estoppel they would not have been bound.

With respect therefore the judicial view of the role of estoppel in these two cases appears somewhat limited.

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20. [1982] 1 Lloyd's Rep. 456.

On the other hand Jefferies J. in the High Court of New Zealand in Beech v Beech[21]. readily accepted the Ramsden v Dyson principle as founding a cause of action.

The above dicta can be described as unfortunate. With respect the Court of Appeal in Amalgamated Investment & Property Co. v Texas Commerce International Bank was afforded an opportunity to lay low the ghost of the proposition that estoppel cannot operate as a cause of action, once and for all. In the circumstances it chose not to do so but, on the contrary, words such as 'that while a party cannot in terms found a cause of action on an estoppel' could well be construed by future courts, as well as counsel, that the issue is not settled and is still very much alive. It is perhaps doubly unfortunate that this dicta should have come from such an eminent authority as the Court of Appeal and at such a late period in the history of the development of the Ramsden v Dyson principle. The way would thus appear to be open for the myth to be perpetuated.

Any rigid application of the rule that estoppel is not a cause of action could serve to drastically reduce the effectiveness of the Ramsden v Dyson principle to operate to rectify unconscionable situations. This would depend, of course, upon some definition being given to the expression 'cause of action'. What the courts have done up until the present is to allow the principle to attach to a set of facts, which would not of itself, amount to a cause of action, and thereby render those facts actionable. It is in this way that the principle can be at its most flexible. It is submitted that, overall, the current mood of the courts is very much against allowing the utility or flexibility of the Ramsden v Dyson

21. (High Court, Wellington to 24 February 1982 (A No.144/80) Jefferies J. at page 11)

principle to be trammelled by the requirement that it cannot operate as a cause of action.

Conclusion: The Last Word

Appropriately the final word in this discussion is left to Lord Denning who perceives the issue as not being one of whether the estoppel is or is not a rule of evidence, or a cause of action, but rather who sees estoppel as some all consuming principle of justice:

> 'Estoppel is not a rule of evidence, it is not a cause of action. It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs he will not be allowed to go back upon it when it would be unjust or inequitable for him to do so'[22].

This broad view was reiterated by Lord Denning at a later point of time in Amalgamated Investment & Property Co. Ltd v Texas Commerce International Bank where the relatively cursory treatment which he accorded the issue would appear to indicate that he regarded the matter, by that time, with some degree of disdain. He disposed of the issue by simply reiterating his earlier dicta:

> '(Estoppel) ... has been sought to be limited by a series of maxims: estoppel is only a rule of evidence: estoppel cannot give rise to a cause of action: ... All these can now be seen to merge into one general principle shorn of limitations. ... neither of (the parties) will be

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22. As per Lord Denning in Moorgate Mercantile v Twitchings [1976] 1 Q.B. 225 at page 241.

allowed to go back on that assumption when it would be unfair or unjust to allow him to do so'[23].

This approach completely rejects any procedural limitation of estoppel to being a rule of evidence, a defence, a cause of action or not a cause of action. Instead it would appear to present estoppel as merging into the general jurisdiction of the equitable intervention. It is certainly a much more holistic approach that that adopted by Brandon L.J. in the same case[24]. which lends itself to a technical analysis as to its true scope and meaning and also to the accumulation of precedent even in respect to specific aspects of the dicta laid down. If carried to an extreme position this approach could mean that the proposition that estoppel cannot operate as a cause of action could provide almost a watertight defence in virtually any action where the Ramsden v Dyson principle is pleaded.

The view taken by Lord Denning, it is submitted, is far more realistic and accords with the attitude found in contemporary cases. It clearly indicates the current disinclination of the courts to allow the principle to become entangled with rules which could provide readily adaptable defences which could be raised to defeat the dictates of a solution designed to rectify an unconscionable situation.

The approach of Lord Denning was clearly evident in the earlier Court of Appeal decision in Pascoe v Turner[25]. a case based principally upon the Dillwyn v Llewelyn principle but where the Court took time off to state, after citing Ramsden v Dyson, 'that where estoppel

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23. [1982] 1 Q.B. 84, [1981] 3 All E.R. 577 at page 122 and page 584 respectively.

24. See supra

25. [1979] 2 All E.R. 945

by encouragement or acquiescence is found on the facts those facts give rise to a cause of action'[26]. That decision clearly illustrated the utility of estoppel in a role as cause of action as well as a defence. The representee occupant of the property in dispute had sought merely to rely upon estoppel as a defence, that was to prevent the representor legal owner of the property, who had placed the representee into possession, from denying the existence of a trust in her favour. In its desire to best satisfy the equity the Court took the matter much further than simply recognising a trust in favour of the representee. Of its own volition the Court took the action much further than this defence and enabled the representee to obtain the fee simple of the residential property in dispute. Surely no clearer example of the operation of estoppel as a cause of action could be found. Had estoppel not operated as a cause of action here the representee could have relied, correctly, upon the Dillwyn v Llewelyn principle, to act as a defence and prevent the representor from denying the existence of a trust in her favour. This would have meant that the representor held the property in trust for the representee. The action would then have ceased at that point. The fact that estoppel could not operate as a cause of action would have prevented the action from being taken further. As it was the Court enabled the representee to secure the maximum proprietary right in the property.

The conclusion must thus be that even if some indeterminate arguments can be put forward for the view that estoppel by express

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26. Ibid at page 949. This clearly illustrates the point that the Dillwyn v Llewelyn principle has a basis identical to that of the Ramsden v Dyson principle.

representation cannot operate as a cause of action, that maxim certainly does not apply to the Ramsden v Dyson principle. The current attitude of the courts is to maintain the flexibility of the principle and not to encumber it with this restriction. The view put forward by Lord Denning in in Amalgamated Property and Investment Co. would certainly appear to be in the ascendant at present. This view clearly confirms that of Robert Goff J. in the High Court in the same case when he said;

> '... it is in my judgment not of itself a bar to an estoppel that its effect may be to enable a party to enforce a cause of action which without the estoppel would not exist'[27].

The view that estoppel cannot operate as a cause of action is, despite dicta to the contrary, a myth and should be laid to rest. The cleavage between judicial dicta to the effect that estoppel is not a cause of action, on the one hand, and judicial finding, which clearly establish estoppel as a cause of action, on the other, is great, and at the same time is most unfortunate.

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27. [1982] Q.B. 84 at page 105 [1981] 2 W.L.R. at page 571

Chapter Six

UNCONSCIONABILITY AS THE BASIS OF THE PRINCIPLE

Introduction: Search for a Basis

The propensity of the courts to extend the scope of the Ramsden v Dyson principle together with their reluctance to perscribe rules likely to constrain its application has opened the door to the resurgence of unconscionability and its elevation to the position of being the basis of the application of the principle. With the rejection of technicality unconscionability can now be clearly seen as the fundamental and virtually sole constraint upon the application of the principle. The jurisdiction in the Ramsden v Dyson principle is asserted when a situation presents itself which equity regards as unconscionable and requiring of rectification.

The chancery judges up until the early nineteenth century applied the concepts of unconscionability in a robust and uninhibited manner. They were very clear in their own minds as to what amounted to unconscionable behaviour. The decisions handed down were frequently highly subjective in content and made no qualms at calling upon extra legal sources, including Holy Scripture, to justify their findings. They did not confine their judgments to a simple application of established legal principles to facts as they found them. Contemporary judges have tended to adopt similar techniques.

The Move Towards Unconscionability: And Away From Technicality

Decisions handed down since the late 1950's reflect two quite disparate approaches to the application of the Ramsden v Dyson principle. The older approach rested upon technicality and has now tended to recede in the face of a much broader approach based upon unconscionability.

This latter approach has been fostered to a very substantial degree by the deliberations of Lord Denning, and is now very firmly in the ascendant.

This cleavage to some extent reflects the dissenting judgment of Lord Kingsdown in Ramsden v Dyson itself in relying upon and emphasising inferences which may be drawn from facts.

Although the New Zealand courts have tended to be somewhat more circumspect in their application of the principle than their English counterparts the more recent decisions of our courts clearly show a move towards the broader approach.

This shift is clearly revealed in a comparison between the decision of the New Zealand High Court in McBean v Howey [1.] handed down in 1958, and that of the same court in Beech v Beech [2.] handed down in 1982. This shift could have been influenced by the decisions of the English courts in the interim.

McBean v Howey provides an example of the older approach in not making an overall assessment of the facts as a whole but in taking one or two specific inferences from the facts and basing the finding essentially upon those few inferences. In McBean v Bowey Barrowclough C.J. appears to have been partly influenced in rejecting the application of the Ramsden v Dyson principle by the fact that he found no concluded contract in existence. He appears to have allowed his attitude towards the pleading of the principle to be influenced by the fact that no contract existed. In 1948 the two parties in McBean v Howey had concluded an agreement, in the form of a licence, whereby the representee was permitted a vehicle access over part of the representor's property in order to permit entry to a garage which was situated upon the representee's property. The representor had actually assisted in the work involved in the construction

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1. [1958] N.Z.L.R. 25

2. (High Court, Wellington 24 February 1982, (A No 144/80.) Jefferies J.)

of the driveway and garage. In this respect there was clearly encouragement probably sufficient to satisfy the requirement of Ramsden v Dyson. The arrangement continued in force for some nine years. Notice was then given by the representor to revoke the licence and the representee sought to call the Ramsden v Dyson principle into aid in order to sustain an injunction to restrain the revocation of the right of access.

But this Barrowclough C.J. was not prepared to concede. Having established that there was no contract he emphasised that the representee did not have a mistaken belief as to his rights and, in particular, that he did not believe that he had a right in perpetuity. [3.] Ramsden v Dyson and the probanda of Fry J. in Willmott and Barber were applied to this end.

A similar approach was taken in the much later case of Denny v Jensen [4.] where, after it having been concluded that there was no contract of sale, White J. applied Willmott v Barber and viewed the application of the Ramsden v Dyson principle substantially in terms of the degree of knowledge required of the representor to constitute the fraud sufficient to raise the equity.

This narrow approach to the application of the Ramsden v Dyson principle also found support with the House of Lords in Kammins Ballrooms v Zenith Investments (Torquay) Ltd [5.] and especially in the speech of Lord Diplock where the probanda of Fry J. were applied in order to disallow

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3. C.f. Ramsden v Dyson

4. [1977] 1 N.Z.L R 635 The representee had been let into possession by the representor with a mistaken belief on the part of the former that there had been a contract of sale. But the representor alleged that the representee had merely been granted possession upon a tenancy. In the mistaken belief of continued and permanent possession, the representee carried out repairs, at, it appears considerable expense, and the execution of this work was apparently known to the representor who took no action to inform the representee of his state of mind in respect to the position of the latter.

5. [1971] A.C. 850

the pleading of the principle which had been raised by a tenant representee in order to prevent the landlord representor resiling from an agreement which they had concluded in respect to a court hearing for a new tenancy. Unbeknown to both the parties the date wbich they had agreed upon for the hearing was outside the limits allowed by statute with the result that the tenant lost any chance of a renewal of tenancy. This was a clear case of convention as both the parties had agreed upon the date for the hearing of the application. This did not influence their Lordships who were prepared to determine the issue upon the narrow point of the state of knowledge of the representor. According to Lord Diplock;

> '... the party estopped by acquiescence must, at the time of his active or passive encouragement, know of the existence of his legal right and of the other party's mistaken belief in his own inconsistent legal right. It is not enough that he should know of the facts which give rise to his legal right' [6].

Although this decision is of the highest authority it appears to have been substantially ignored by later courts. [7].

Had the particularistic approach to the application of the Ramsden v Dyson principle which is evident in these cases been extended by the courts into a general rule for the application of the principle, it would be very difficult to see any representee ever successfully pleading the Ramsden v Dyson principle.

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6. ibid at page 884

7. It was brushed aside by Oliver J. In Taylors Fashions Ltd. v Liverpool Victoria Trustees Co Ltd [1982] 1 Q.B. 133 at page 147 and was not considered at all in Amalgamated Investment and Property Co. Ltd. (in liquidation) v Texas Commerce International Bank Ltd (1982) Q.B. 84 where it was clearly relevant.

These decisions all indicate that the court regarded the simple application of the probanda of Fry J. in Willmott v Barber as finally determining the issue and completely overlook that the probanda are, as have been indicated by other decisions, merely one specific test which may, at the discretion of the court, be applied in specific cirumstances, as but one step in the determination of a wider assessment of whether the facts, taken as a whole, reveal unconscionability sufficient to enable equity to assert jurisdiction.

To be more specific all of these cases emphasise the actual state of knowledge of the representee as to the legal situation and overlook that even if that state of knowledge is assumed the subsequent conduct of the representor was such that an expectation was raised in the mind of the representee, by the representor, that he the representor, would not fall back upon the legal rights and enforce them at a later point of time. This is especially evident in McBean v Howey where it could well be argued that although the representee was aware of the legal position, the conduct of the representor, in actively participating in the building of the garage and driveway and allowing the arrangement to continue for some nine years, was surely sufficient to obliterate any knowledge which the representee may have had of his own legal position, and raise the requisite equity in his favour.

These decisions reflect a clear propensity to protect formal property rights as against any rights of an equitable nature that could be perceived as satisfying good conscience. None of these instances exhibited any tendency on the part of the court to specify in detail what would have been required of the representee in order for him to succeed in raising, in his favour, an equity sufficient to allow the Ramsden v Dyson principle to be called into aid. [8.]

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8. Although White J. in Denny v Jensen made reference to and cited from, Inwards v Baker [1965] 2 Q.B. 29; [1965] 1 All E.R. 446, it is submitted that his decision represents an approach to the application of the principle that is so different in degree as to amount to being in conflict with that decision. See under 'A Broader Approach to Unconscionability Now in the Ascendant' infra, ibid chapter.

With respect it is submitted that, in the light of subsequent decisions, and also in the light of a number of existing decisions, McBean v Howey was most certainly wrongly decided and that the decision in Denny v Jensen [9]. was highly dubious.

Attention will now be directed to the alternate approach to the application of the principle. This approach is now very much in the ascendant and has been confirmed by the most recent decisions.

A Broader Approach to Unconscionability Now in The Ascendant

A concurrent series of decisions, both English and New Zealand, exhibits a vastly more expansive approach to the application of the Ramsden v Dyson principle. In these cases the courts have experienced no difficulty in applying the principle in favour of the representee in a vast array of different factual situations. Many of these have been of a domestic nature but there is no indication that the principle is confined to domestic situations. But these decisions do show that the courts will not hesitate to resort to the principle as a device to redistribute property rights.

This broader approach does not rest upon technicality. It has, for example shown a decided irritation with the probanda of Fry J. in Willmott v Barber. Rather it is directed to making a broad assessment of the situation to determine whether, in the circumstances, it would be just or equitable to allow the representee to rely upon the principle. Signs of such an approach date back to at least the 1900's [10]. but its formulation into a coherent concept of unconscionability has only taken place in very recent decisions and it not, as yet, by any means complete.

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9. [1977] 1 N.Z.L.R. 635

10. See the New Zealand decisions in Cameron v Cameron (1891) 11 N.Z.L.R. 6421; Re Hume (1909) 12 G.L.R. 61; Re Whitehead [1948] N.Z.L.R. 1066; for earlier examples of the application of the principle.

In Hopgood v Brown [11] Evershed M.R. in the Court of Appeal, in 1955, was prepared to distinguish Willmott v Barber as applicable only in cases of acquiescence and he then went on to apply the principle to preserve a right of way over land.

Comments of Lord Denning M.R. in Inwards v Baker [12] clearly confirmed this trend if they did not actually set it in train. There a son had at his father's request, given up building upon his own land and erected a residence upon land owned by the father, both contributing equally to the cost of the dwelling where the son remained until the death of the father some twenty years later. All parties were apparently clearly aware of the legal situation but the court found that it was difficult to assess the state of knowledge of the representee except that he expected to stay in the house for his entire life. This possible area of uncertainty did not deter Lord Denning M.R. from applying the Ramsden v Dyson principle [13] in favour of the son. The state of knowledge of the representee was not regarded as the determining factor but with a strict application of the probanda of Fry J. the action probably would not have been decided in favour of the son. Rather Lord Denning M.R. was prepared to find the requisite equity in the unconscionability of removing the representee from the property after the expectation of permanent possession had been created by the conduct of the representor father. In a judgment quite hereft of technicality he maintained that;

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11. [1955] 1 W.L.R. 213.

12. [1965] 2 Q.B. 29

13. With the assistance of Plimmer v Mayor of Wellington (1884) 9 App. Cas. 699, and Dillwyn v Llewelyn (1862) 4 De. G.F. & J. 517; 45 E.R. 1285.

> 'All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable to do so' [14].

Two years later Lord Denning, in the Court of Appeal continued this trend and applied the principle to protect a right of access to a garage in E.R. Ives Investments Ltd v High [15]. where he stated the representor 'created in the defendant's mind a reasonable expectation that his access over the yard would not be disturbed. That gives rise to an "equity arising out of acquiescence" [16]. Danekwerts L.J. in the same case, emphasized the highly subjective value judgments which the Court felt itself free to apply in assessing the equity;

> '(the representor) stood by and, indeed, encouraged the defendant to build his garage in these conditions and for these purposes. Could anything be more monstrous and inequitable afterwards to deprive the defendant of the benefit of what he has done?' [17]

In these two cases the essential ingredients of the equity was viewed in a very straightforward manner by the court. Little attention was paid to anything except the actual standing by of the representor while the representee acted to his detriment. There was no concern with applying any predetermined rules and in particular the probanda of Fry J. in Willmott v Barber were not considered.

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14. [1965] 2 Q.B. 29. at page 37

15. [1967] 2 Q.B. 379 [1967] 1 All E.R. 504, also Ward v Kirkland [1967] 1 Ch. 194 [1966] 1 All E.R. 609, [1966] 1 W.L.R. 601.

16. [1967] 2 Q.B. 379 at page 394.

17. ibid at page 399.

Lord Denning M.R. continued this expansive approach in Crabb v Arun District Council [18]. where the Ramsden v Dyson principle was applied by the Court of Appeal to provide a right of way to back land after the representee landowner, in reliance upon representations by the representor Council together with the fact that it had erected gates at appropriate places, had sold adjoining land thus making him dependant upon the right of way. Again the vital matter in the raising of the equity in favour of the landowner appears to have been the expectation which was raised by the representor Council in its conduct in erecting the gates, indicating a grant of access, following a meeting with the Council.

Crabb v Arun District Council confirms that the probanda of Fry J. are but a step in the fabrication of the equity. Of the three judgment only that of Scarman L.J. as he then was, pays more than passing attention to the probanda and these he applied in a very broad manner picking out only the last, that is the requirement of encouragement by the representor, for detailed analysis in terms of the facts of the case. Perhaps the essence of Scarman L.J.'s assessment of what is required to establish the equity is in his summing up of the effect of the probanda thus;

> 'The court therefore cannot find an equity established unless it is prepared to go as far as to say that it would be unconscionable and unjust to allow the defendants to set up their undoubted rights against the claim being made by the plaintiff' [19].

This requirement of unconscionability he found satisfied by the passage of time, the abstention and the gate.

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18. [1976]1 Ch. 179 [1975]3 All E.R. 865.

19. [1976] 1 Ch. 179 at page 195.

Crabb v Arun District Council also indicated how in some instances it would have been appropriate for the representee to consult with the representor in order to establish his legal position and thus furnish himself with the appropriate state of knowledge as to his position. Failure to do so would destroy any equity which might otherwise arise in favour of the representee. However Scarman L.J. did not believe that the representee in the instant case was under any obligation to establish his legal position and he did not specify the circumstances when the representee would be likely to defeat his own equity by not attempting to determine what the legal position was. [20.]

A further significant development evident in Crabb v Arun District Council was that it exhibited a much greater analysis of the facts in order to establish unconscionability than was evident in the cases referred to supra. Considerable tracts of evidence are, for example reproduced in the judgment of Scarman L.J. [21.]

The modus operandi to be adopted by the court in assessing the equity in aptly summed up in the words of Lord Scarman in Crabb v Arun District Council when he said that '... one has to look at the whole conduct of the parties and the developing relationship between them' [22.] Crabb v Arun District Council clearly reflects such a view.

Lord Denning M.R. seized the opportunity to apply Inwards v Baker and Crabb v Arun District Council in Jones (A.E.) v Jones (F.W.) [23.] in an extremely unadorned judgment. This was but yet another domestic case where a son had been led to believe by his father that he would be permitted to remain in a particular property for the remainder of his life.

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20. ibid at page 198.

21. See e.g. ibid at page 196.

22. [1976] 1 Ch 179 at page 198.

23. [1977] 2 All E.R. 231.

A similar approach was adopted by Jefferies J. in the High Court of New Zealand in Beech v Beech where it was recognised as necessary to subject a family relationship to a strict analysis to ascertain whether an old and respected doctrine of equity applies. [24.]

The cases considered so far indicate a shift towards the revival of a concept of unconscionability as the basis for the equity in the Ramsden v Dyson principle. But they do not develop this nascent concept to any great extent. They confirm a drift away from a strict application of rules and especially the particularistic application of the probanda of Fry J. to a holistic assessment of the facts and the application to that assessment of subjective [25.] value judgments as to what is justice in the given circumstances.

The door was thus opened to the formulation of a more visable concept of unconscionability as the basis of the Ramsden v Dyson principle

The Establishment of a Requirement of Unconscionability

From the mid 1960's there has been a clear reversion back to what might be termed 'untramelled unconscionability' as the fundamental ingredient which the representee must prove in order to invoke the Ramsden v Dyson principle. It is now quite clearly established that unconscionability is the essential ingredient of the equity.

The terminology relevant to this concept has not much troubed the courts. The expressions 'unconscionability, inequitable, or unjust' [26.] have all been used as apparently meaning the same thing.

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24. (High Court, Wellington, 24 February 1982 (A No 144/80) Jefferies J. at page 9)

25. See also Siew Soon v Yong Tong Hong [1973] A.C. 836; [1973] 2 W.L.R. 713, P.C. also the New Zealand case of Van den Berg v Giles [1979] 2 N.Z.L.R. 111, which was a classical situation of improvements to property where Jeffries J. indicated that estoppel would have been a possible alternate cause of action.

26. As per Scarman L.J. in Crabb v Arun District Council [1976] 1 Ch. at page 195.

The earlier decisions in this period tend to make no overt reference to this requirement but tend rather to exhibit a sub-silentio acceptance of such. In E.R. Ives Investments, Ltd. v High [27] Lord Denning was prepared to concede the equity with a very few words;

> 'The right arises out of the expense incurred (by the defendant and the representor) standing by and acquiescing in it ... By so doing the (representor) created in the defendant's mind a reasonable expectation ... That gives rise to an 'equity arising out of acquiescence' [28].

This makes no attempt to formulate any general concept of unconscionability but simply assumes that such was present in the particular circumstances of the case.

Later in Crabb v Arun District Council in a more ornate judgment Lord Denning again confirmed that '... it is the first principle upon which all Courts of Equity proceed that it will prevent a person from insisting on his strict legal rights ... when it would be inequitable for him to do so ...' [29] Although he went on to spell out what, in the circumstances of the instant case, amounted to inequitable conduct, he refrained from formulating any general principle of unconscionability.

A clear step further to the establishment of 'untrammelled unconscionability' as the sole basis of the Ramsden v Dyson principle was taken by Oliver J. as he then was, in the Chancery Division in Taylors Fashions Ltd v Liverpool Victoria Trustees Co. Ltd. [30] where, after apparently having listened to lengthly argument by counsel as to what was required to be shown to establish the equity in Ramsden v Dyson he concluded

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27. [1967] 2 Q.B. 379

28. ibid at page 394

29. [1976] 1 Ch. 179 at pages 187-188

30. [1982] 1 Q.B. 133

'... the more recent cases indicate, in my judgment, that the application of the Ramsden v Dyson ... principle ... requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to enquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour' [31]

Oliver J. continued to the effect;

'The inquiry which I have to make therefore, as it seems to be, is simply whether, in all the circumstances of this case, it was unconscionable for the defendants to seek to take advantage ...' [32].

This formulation was adopted and applied by Robert Goff J. in Amalgamated Investment & Property Co Ltd v Texax Commerce International Bank. [33]

Oliver L.J. had the unique opportunity to add the authority of the Court of Appeal to his formulation of the basis of the Ramsden v Dyson principle when he reaffirmed it in Habib Bank v Habib Bank A.G. Zurich Ltd. [34].

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31. ibid at pages 151-152.

32. ibid at page 155.

33. [1982] 1 Q.B. 44 at page 104.

34. [1981] 2 All ER at page 666 where he reaffirmed that '... the more recent cases indicate ... that the application of the Ramsden v Dyson ... principle ... requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable ...' ibid.

To summarise at this juncture. The basis of the Ramsden v Dyson principle, after some period of uncertainty, now appears to have settled upon unconscionability as its basis. This would appear to be implicit in the broader approach to the equity which is not dependent upon the application of predetermined rules. Although the evolution of unconscionability can be detected as far back as the mid 1960's it has now been honed into a much sharper and far more explicit basis of the Ramsden v Dyson principle.

Judicial Perception of Unconscionability

If unconscionability can now be looked upon as the basis for the application of the Ramsden v Dyson principle the question is raised as to the nature and substance of this concept. How do the judges perceive it?

This question could be answered in an ad-hoc manner by an examination of the specific conduct and situations which have variously been regarded as unconscionable. But it is possible to discern, in broad outline at least, the subjective assessment which will be made of a particular situation to determine whether or not it can be labelled as unconscionable. Thus the courts are seeking something which has been variously described as; 'unfair or unjust' [35.] or 'most inequitable' [36.] In Habib Bank Ltd v Habib Bank AG Zurich Oliver L.J. accepted the use of the expression 'wholly inequitable' [37.] which had been used in the judgment of the Lower Court.

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35. As per Lord Denning MR in Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd [1982] 1 Q.B. 84 at page 123.

36. As per Oliver J. in Taylors Fashions Ltd v Liverpool Victoria Trustees Co. Ltd [1982] 1 Q.B. 133 at page 158.

37. As per Oliver L.J. [1981] 2 All ER at page 668.

It does not appear to be possible to take the conception of unconscionability to any more basic level than this. [38.] These scraps of dicta amount to nothing more than an indication of subjective judicial value judgments which will be applied to the facts of the case. It is now being made manifest that indeed the application of unconscionability does amount to a subjective value judgment;

'It would, in my judgment, be most inequitable ...' [39.]

and

'I, too, think that it would be wholly inequitable ...' [40.]

The resurgence of unconscionability is not limited to the Ramsden v Dyson principle. It has revived in the 'unconscionable bargain' in contract [41.] and has been incorporated into statute [42.] But an examination of the judicial perception of unconscionability in other areas is of little assistance in ascertaining its nature in respect to its application to the Ramsden v Dyson principle.

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38. These current conception of unconscionability can be compared with ideas put forward in the nineteenth century such as 'natural equity', 'good sense', 'good faith', 'common sense', 'common justice', 'morality', 'wholesomeness' which the doctrine of estoppel is sought to achieve, and 'unfairness', 'mischievousness' 'playing fast and loose with justice' which situations estoppel may be resorted to to rectify. See Spencer-Bower G and Sir Alexander Turner 'The Law Relating to Estoppel by Representation' 3d. ed. London, Butterworths 1977 paragraph 15, page 21.

39. As per Oliver J. in Taylors Fashions Ltd v Liverpool Victoria Trustees Co. Ltd. [1982] 1 Q.B. 133 at page 158.

40. As per Oliver L.J. in Habib Bank v Habib Bank A.G. Zurich Ltd [1981] 2 All ER at page 668 line e.2.

41. C.f. Archer v Cutler [1980] 1 N.Z.L.R. 386, O'Connor v Hart [1983] N.Z.L.R. 280.

42. Credit Contracts Act 1981 S. 10 (1) (a) Minors Contracts Act 1969 S 5 (2) (a).

In assessing unconscionability the court would most certainly take into account any unconscionable behaviour on the part of the representee. [43.]

Conclusion: The Incidents of Unconscionability.

By a process which has taken something like two decades to reach fruition the Ramsden v Dyson principle appears to have divested itself of a series of rules which once encumbered it, has assumed much more expansive proportions, and appears to have finally come to rest upon unconsionability as its basis. The likely consequences of unconscionability and a broader assessment of it as the foundation stone for this principle will be reserved for consideration at a later point in this work. [44.] It remains, presently to summarise the apparent incidents of unconscionability as they can be gleened from the decided cases.

Firstly, it appears clear, that there can be no confining of unconscionability to a 'some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour' [45.]

Secondly, if unconscionability is not subject to preconceived rules then surely what amounts to an unconscionable situation can only be determined by the application of a subjective value judgment to the facts of specific cases. What amounts to unconscionability is thus internal to the mind of the individual judge. It follows from this that its application is wholly at the discretion of the individual judge and surely this is in accordance with the best tradition of the equitable jurisdiction.

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43. As in D & C Builders v Rees [1966] 2 Q.B. 617.

44. See under the subheading The Viability of Unconscionability as a Basis for the Principle in 'Conclusion: Whither the Ramsden v Dyson Principle' chapter twelve infra.

45. [1982] 1 Q.B. 133 at page 152.

Thirdly in assessing unconscionability the court must take into account the facts as a whole. Unconscionability is assessed not in terms of one aspect of the case but in terms of the situation in its entirety. The conduct and position of the representee are just as relevant to unconscionability as the conduct and position of the representor.

No more precise test of unconscionability has yet evolved.

Chapter Seven

THE RAISING OF AN EXPECTATION

Introduction: Conduct of the Representor Essential

In accordance with the classical decisions an essential feature to the assertion of the jurisdiction in the Ramsden v Dyson principle was the conduct of the representor. That is the party against whom the estoppel is raised. Being a product of equity it was essential that an equity be raised in favour of the representee before the principle could be called into aid. But equity was just as intent upon protecting the rights of the representor as those of the representee who was seeking the assistance of equity. There must be some element within the conduct of the representor to which equity can attach in order to assert jurisdiction. If equity sees the conduct of the representor as in every respect exemplary, then, irrespective of any detriment which the representee has suffered, it could not assert jurisdiction.

The conduct of the representor is, in the light of contemporary decisions, still a crucial factor in the assertion of the equity. But it appears that the conduct which will be regarded as sufficient to support the Ramsden v Dyson principle has widened somewhat in scope from that evident in the earlier cases. This has been brought about, to some extent, at least, by the more diffused and prolix situations which the courts are not faced with.

The Concept of Equitable Fraud Preserved

Early decisions speak of the requirement of 'equitable fraud' as necessary to invoke the assistance of equity. But equitable 'fraud was "infinite" in the sense that it was discerned in quite

disparate circumstances so as to make the concept appear amphibolous'[1]. It is clear that an intention to cheat or deceive was not an essential ingredient of equitable fraud.[2] To some extent equitable fraud can be seen as an application of the principle of preventive justice, designed to shut out any inducement to perpetrate a wrong, rather than to rely on mere remedial justice after a wrong has been committed. Thus the application of the jurisdiction in the Ramsden v Dyson principle could be seen as disarming the representor of rights which he may, apart from estoppel, have to fall back upon at law and thus to discourage him from taking advantage of a situation in which the temptation might otherwise be too great.

The early cases do generally exhibit an element of what could be regarded as 'fraud' in a modern context. Thus it was regarded as satisfying the equity if; a landlord, with full knowledge that a lease is invalid allows the tenant to improve the land with the intention of taking the value of the improvements;[3] a landlord continues to accept rent knowing that the lease was invalid;[4] in full knowledge of the legal position an owner allows another who is ignorant of the legal position to build upon his property.[5]

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1. Meagher R.P. W.M.C. Gummow and J.R.F. Lehane 'Equity Doctrines and Remedies' Butterworths Sydney etc, 1975, page 295 paragraph 1202.
2. '... it is a mistake to suppose that an actual intention to cheat must always be proved' as per Lord Haldane in Nocton v Lord Ashburton [1914] A.C. 932 at page 954.
3. as in the Earl of Oxford's Case (1615) 1 Ch. Rep. 1; 21 E.R. 485
4. As in Stiles v Cowper (1748) 3 Atk. 692; 26 E.R. 1198.
5. As in East India Company v Vincent (1740) 2 Atk. 83; 26 E.R. 451.

On the other hand there are isolated instances where equity would allow redress, in the form of estoppel, for representations which were clearly careless but were made with an honest belief in their truth at the time they were made.[6.]

The expression 'equitable fraud' is not used in contemporary judicial parlance. But the courts have made no attempt to restate the classical idea of equitable fraud. Although it is now probably more appropriate to speak of a requirement of 'unconscionability' as a necessary ingredient of the representor's conduct, it is submitted that the modern decisions have fully kept within the equitable tradition of fraudulent conduct.

Equity did not prescribe the conduct on the part of the representor which would bind his conscience. This policy has continued. To satisfactorily examine this aspect it is thus necessary to look at instances of conduct which have been regarded as unconscionable and to draw generalisations from them but at the same time remembering that any generalisations so derived must never be regarded as in any way limiting the future conduct of the courts.

Silence as Binding the Conscience of the Representor.

A central feature of the Ramsden v Dyson principle is that it does not need to rest upon a specific representation. It can go much further and rest upon the complete silence of a party. In this

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6. See e.g. Burrowes v Lock (1805) 10 Ves. Jun. 470; 32 E.R. 927. where a trustee was required to make good the loss suffered by a creditor after representing to him, honestly but carelessly, that the interest of a beneficiary was unencumbered. This case was not determined upon the Ramsden v Dyson principle but it is submitted that any rule laid down in it would be equally applicable to the Ramsden v Dyson principle.

respect equity went much further than the common law. The Ramsden v Dyson principle can be seen as representing the outer limits of the circumstances in which relief would be granted in equity. It could be said therefore that it was necessary for equity to manufacture a representation from silence. But would any 'form of silence' be sufficient to allow the principle in? How could silence, which the law has traditionally shunned rendering actionable, be made to bind the conscience of the representor?

Whether or not silence can bind the conscience of the representor can only be determined by assessing that silence within the context of the entire conduct of the representor. The courts have not focussed upon one specific element within the conduct of the representor but will assess his conduct taken as a whole. Rarely is it that the courts have only silence within the conduct of the representor to examine. There will usually be some other conduct and this will often serve to 'colour' the silence as being either unconscionable or not.

Relevance of the State of Knowledge of the Representor

The state of knowledge possessed by the representor has played a prominent part in many decisions and it will be recalled that it was a central feature in the probanda of Fry J. in Willmott v Barber[7]. and in the statement of the principle, set out in Ramsden v Dyson itself, by Lord Cranworth.[8].

There is no doubt that where the silent acquiescence is relied upon by the representee the state of knowledge of the representor

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7. (1880) 15 Ch.D. 96.
8. (1866) L.R. 1 H.L. 129 at pages 140-141

can be relevant. A silence coupled with the requisite state of knowledge has been referred to as 'conscious silence (which) implies knowledge on the part of the defendant that the plaintiff was incurring the expenditure and in the mistaken belief that there was a contract...'[9]. This goes no further than requiring a specified state of knowledge on the part of the representor to the effect that he knew that the representee was, firstly incurring the expenditure (that is acting to his detriment) and, secondly, also that the representee was mistaken in his belief that he had a legal interest sufficient to sustain the conduct which he was engaging in. That is the representor must have full knowledge of the conduct of the representee as well as the legal position.

Where silence alone is relied upon the proof of the state of knowledge of the representor would be vital. Without the requisite state of knowledge there could not possibly be the requisite fraud to bind the conscience of the representor. Thus where silence, with nothing else by way of representation, is relied upon there would appear to be nothing except the state of knowledge, on the part of the representor, to which equity could attach the necessary unconscionability. It could be said that the represetnor had it within his power to prevent the detriment of the representee simply by breaking his own silence, but that he failed to do so.[10].

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9. As per White J. in Denny v Jenson[1977] 1 N.Z.L.R. 635, at page 638.

10. 'Knowledge of the mistake makes it dishonest for him to remain wilfully passive in order afterwards to profit by the mistake he might have prevented' Snell 'Principles of Equity' 27 ed. page 566. Cited with approval by White J. in Denny v Jensen [1977] 1 N.Z.L.R. at page 638. With respect it is not a necessary ingredient that the representor stand to profit by his silent standing by.

It could be therefore that no party could be encumbered with an equity should he be unaware of his rights and change his mind once he becomes aware of the true situation[11]. However this is not to say that any party who is unaware of his rights, or of the true situation, has an unreserved right to resile from a position which he has previously accepted. Whether he could do so in specific circumstances would depend upon an assessment by the court of the conscionability of his potential conduct in those particular circumstances.[12]

That the representor must himself know the true position before estoppel by acquiescence can arise was vigorously argued by counsel for the representor in Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.[13] where both parties had acted upon the assumption that an option, which in fact was invalid because it was not registered under the Land Changes Act 1925 (U.K.) was binding.

After lengthly deliberation Robert Goff J., in the High Court, rejected this submission. Using as a basis for his finding on this point the statement of the principle contained in the dissenting speech of Lord Kingsdown in Ramsden v Dyson itself he

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11. 'There is nothing inequitable in a man who has no knowledge that an option is his standing by while the option is exercised for the benefit of a settlement which he has some grounds for believing to be entitled to the option' Re Vandervells Trusts (No.2) [1974] 1 Ch.269 at page 302.

12. Where both parties are mistaken as to the legal position and act mutually upon that mistaken assumption a situation of convention could well arise in which case one party attempting to resile, after having discovered the mistake, could well be unconscionable. See under the subheading 'Mistake on the Part of the Representor is Irrelevant ...' infra, ibid chapter.

13. [1982] 1 Q.B. 133.

sets out to show that the authorities are very much against the requirement that it is necessary in all cases that the representor should be aware of the true position. He concludes that:

> 'So regarded knowledge of the true position by the party alleged to be estopped, becomes merely one of the relevant factors - it may even be a determining factor in certain cases - in the overall inquiry![14].

For this proposition he found clear support in both Inwards v Baker[15]. and in E.R. Ives Investments Ltd. v High[16]. the latter of which he found a 'striking example'.

The contemporary view would thus appear to be that it is not essential in all cases that the representor be possessed of knowledge of the true situation, that is, so far as Taylors Fashions Ltd v Liverpool Victoria Trustees Co. Ltd. was concerned, what his strict rights were in relation to the option. Thus in that case the Court rejected any examination of the state of mind of the representor as relevant. Rather it looked at his conduct and the results of that conduct on the representee and addressed itself to the question whether what the representor was now seeking to do was unconscionable.

Thus the state of knowledge of the representor would appear to be only one of the many factors which may, at the discretion of the court, be taken into consideration to determine whether, in the circumstances, his conduct is unconscionable or not.

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14. ibid at page 152.
15. [1965] 2 Q.B. 29
16. [1967] 2 Q.B. 379.

From a practical point of view considerable difficulty could be experienced in applying Ramsden v Dyson in contemporary conditions if it was a requirement that the representor should be fully aware of the legal situation in respect to his own rights and the representee should be equally ignorant of his. In most of the later cases both of the parties have been fully aware of the actual legal situation[17]. and yet the courts have experienced no difficulty in applying the principle. With improved indicia of ownership it is unusual these days that any party will not be aware of the legal position. Thus to require knowledge on the part of one party and ignorance on the part of the other would greatly restrict the applicability of the Ramsden v Dyson principle.

Moreover the requirement of a state of knowledge could present the courts with difficult factual issues which could, in many cases, be very difficult of resolution. Such a requirement would tend to throw a considerable element of subjectivity into the evidential requirements necessary to establish the principle. It would, for example be possible for a representor to act in one particular manner, thereby inducing the representee to act to his detriment, and then to prove that he, that is the representor, acted under a false impression, or that he was mistaken, or that he was unaware of what the representee was doing and hence that this precluded him from breaking his silence. This could pose a

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17. In Pascoe v Turner [1979] 2 All E.R. 945, e.g. both parties were fully aware of who held the legal title to the property in dispute and the legal title was fully known to the parties in Beech v Beech High Court Wellington 24 February 1982 A No 144/80.) In many cases the state of knowledge as to the legal position is irrelevant to the issue of estoppel.

major evidential problem to the representee, especially if, as indicated by White J. in Denny v Jensen[18]. the standard of proof required to verify the state of knowledge of the representor is high and 'strong and cogent evidence'[19]. must be adduced to satisfy the requirement.

Thus what would seem to be more appealing to the courts as a pathway out of having to assess such issues as the intention of the parties would be something analogous to the finding of an agreement in the common law of contract where the intention of the parties may be derived from an assessment which any reasonable man would place upon their conduct. This would serve to ease the evidential requirements by infusing a high degree of objectivity into the situation. This could obviate the position of the representee in a case such as Denny v Jensen, where it was clear that the representor was aware of the expenditure which the representee was sinking into the property, but was able, nonetheless, to successfully plead that he thought that the improvements were being made in the expectation of a long term lease and not in the expectation of attaining the freehold.

A partial solution, at least, to obviating reliance upon the state of mind of the parties, has been found by placing reliance upon the raising of an expectation by the representor. This approach will now be considered.

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18. [1977] 1 N.Z.L.R. 635.

19. ibid at page 639

The Raising of An Expectation Could Bind the Conscience of the Representor.

In view of recent decisions it is now necessary that the conduct required of the representor, in order to raise the equity, be subsumed in a much wider context than a mere examination of the state of his mind.

The decisions appear to have moved to the requirement that the conduct of the representor be such as would amount to the raising, in the mind of any reasonable person, a clear expectation as to a specific state of affairs. The expectation must be raised in such circumstances that it was either intended or likely to be acted upon by the representee. But it need not be specifically directed to the representee.

The current emphasis upon the raising of an expectation as the central element required in the conduct of the represetnor represents a clear reversion back to equity and an acceptance of the dissenting speech of Lord Kingsdown in Ramsden v Dyson itself;

> 'If a man, under a verbal agreement .... or what amounts to the same thing, under an expectation, created or encouraged....'[20.]

In some instances this has been overtly accepted[21.] while in many others it has been tacitly followed.[22.]

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20. (1866) L.R. 1 H.L. at page 170.

21. As for example, by Oliver J. in Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd [1982] 1 Q.B. 133 at page 144, by Lord Denning in Crabb v Arun District Council [1976] 1 Ch. 179 at page 188, and by Scarman L.J. in the same case, ibid at page 196.

22. See infra, ibid subheading.

The requirement of the raising of an expectation in the mind of the representee by the representor as vital to the establishment of the equity is a consistent theme running through the decisions and has now been clearly confirmed. Lord Denning M.R. specifies that the expectation must be 'reasonable'[23]. He has not set out a gloss upon this but it would appear that the expectation which is to be derived from the conduct of the representor would be that which any reasonable man would derive from the conduct. It would seem that it would not be open for the representee to contrive in his own mind some quite unreasonable expectation from the conduct of the representor, and expect a court to satisfy such a phantasy.

Lord Denning M.R. has gone further and indicated that the raising of the expectation may be all that is required of the representor.[24]. But this, it is submitted, does not detract from the fact that the court must view this conduct within the entire circumstances of the case.

The essential element in the conduct of the representor is thus the raising of an expectation in the mind of the representee. This has the effect of infusing a substantial degree of objectivity into the determination of cases where the Ramsden v Dyson principle is pleaded. The court is able to direct attention to what the representor has done, or said, and ask the one essential question

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23. 'By so doing the Wrights created in the defendant's mind a reasonable expectation....' as per Lord Denning M.R. in E.R. Ives Investments, Ltd. v High [1967] 2 Q.B. 379 at page 394. 'On the basis of that reasonable expectation...' as per Lord Denning M.R. in Jones (A.E.) v Jones (F.W.) [1977] 2 All E.R. at page 235.

24. 'All that is necessary is that the licensee should, ... have spent money in the expectation...' as per Lord Denning M.R. in Inwards v Baker [1965] 2 Q.B. 29 at page 37.

'what expectation would that conduct give rise to in the mind of any reasonable representee?'

As an essential feature in the establishment of the principle is the raising of an expectation rather than any specific form of the representation the making of a distinction as between acquiescence and encouragement as the foundation stone for the erection of the principle is now seen as futile. Indeed the courts have not been concerned in defining or distinguishing the expressions 'acquiescence' or 'encouragement'.

The requirement of the raising of an expectation rather than any specific form of representation is a further example of the reversion back to requirements necessary while this principle was within its original jurisdiction.[25]

The Nature and Form of the Expectation Required of the Representor

Understandably the courts have not sought to restrict the manner in which the raising of the necessary expectation can take place or the form which it may assume. Frequently it has involved the placing of the representee in possession of property together with conduct which is clearly indicative that the representee has a definable interest in the property.[26] It can, of course,

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25. '... he would not have done, but upon an expectation' per Lord Eldon L.C. in Dann v Spurrier (1802) 7 Ves. Jun. 231 at page 236.

26. As in Pascoe v Turner [1979] 2 All E.R. 945, where the male party to a defacto relationship placed the female party in occupation of a house property and led her to believe that he had made a gift of it to her. See also Inwards v Baker [1965] 2 Q.B. 29, where the representor induced the representee to relinquish building upon his own land and build upon the land of the representor.

involve standing by while the representee makes improvements to the property without any specific representation on the part of the representor.[27] It can involve the purchasing of property in the name of the representor and placing the representee into possession in such a manner as to raise in the mind of the representee the expectation of a specific interest in that property.[28]

In most of the successful cases the representor has manifested, either by an overt act, or by failure to act, conduct consistent with the proprietary right which he has led the representee to believe that he has in the property.

It is possible to extend the raising of the requisite expectation to situations with property other than land as their subject matter. In Habib Bank Ltd v Habib Bank AG Zurich[29] the Ramsden v Dyson principle was successfully raised to resist an action in the common law tort of passing of. The representor had consented in the representee bank assuming its trade name and had allowed

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27. As in Hauhungaroa Block v Attorney General [1973] 1 N.Z.L.R. 398, where the owner representor stood by while the representee constructed a road through the property.

28. As in Beech v Beech (High Court, Wellington, 24 February 1982 (A No. 144/80) Jefferies J.), where a farm had been purchased in the name of the representors because the representee, who was of limited means, would have experienced difficulty in obtaining the necessary finance. But the representors then placed the representee in possession and acted at all material times as if he had the fee simple of the property. See also Jones (A.E.) v Jones (F.W.) [1977] 2 All E.R. 231, where the deceased representor had induced his son to move from his existing property by purchasing another property in his own name, accepting a contribution from the son towards the cost, and subsequently acting as if he had made a gift of the property to the son. See also Cameron v Cameron (1891) 11 N.Z.L.R. 642.

29. [1981] 2 All E.R. 650.

the use of the 'Habib' name for some four years between 1973 until 1977 thus raising an expectation that no objection would be taken to the continued use of that trade name.

Mistake on the Part of the Representor is Irrelevant To the Raising of the Required Expectation

It has previously been indicated that the state of mind of the representor is only one factor which the court may, at its discretion, consider relevant to the assessment of whether or not the situation is unconscionable. It now appears clear that a mistake on the part of the representor will not necessarily prevent him from raising the required expectation. The representor can be completely ignorant of the true situation and still raise an expectation necessary to call the Ramsden v Dyson principle into operation.

It is thus the objective effect of the conduct of the representor which the court will examine. A mistake on the part of the representor is quite irrelevant to this. A representor can quite unwittingly give rise to an expectation which, in effect, is based upon a total misconception of the real state of affairs. If the representee has acted upon that expectation the courts could hold the representor to it despite his mistake.[30.]

This is aptly illustrated by both Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.[31.] where both parties were mistaken as to the validity of an option to renew a lease, and

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30. 'So here, there is no specific requirement, ... that the (representor) should know or intend that the expectation which he has created or encouraged is one to which he is under no obligation to give effect' as per Oliver J. In Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. [1981] 1 Q.B. 133 at page 145

31. supra

Amalgamated Investment & Property Co. Ltd. (in liquidation) v Texas Commerce International Bank Ltd.[32] where both the parties were mistaken as to the validity of a guarantee.

It seems to follow that it is now irrelevant that the representor could have prevented the loss of the representee, ab initio. A significant movement in this direction was taken in the extention of the Ramsden v Dyson prinicple to situations of convention. This development meant that the principle is no longer limited to cases where the loss of the representee could have been prevented, from the beginning, by the representor. It will be recalled that Lord Cranworth did specify this as an element in his statement of the prinicple.[33]

It is Immaterial Whether the Expectation Created by the Representor is in Respect to Fact or Law

It would appear that the evolution of a requirement that the representor should raise an expectation could serve to overcome what has long been a source of confusion in the administration of the law of estoppel.

There is authority for the proposition that there can be no estoppel in respect to a statement of law as distinct from a statement of fact.[34] It is true that any rule to the effect that

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32. [1982] 1 Q.B. 84

33. '... in order afterwards to profit by the mistake I might have prevented' (1866) L.R. 1 H.L. 129 at page 141.

34. 'One realises ... that in dealing with the doctrine of estoppel one must always be careful to see that the court is not saying that a man is estopped from stating what is the law' as per Cassels J. in Algar v Middlesex County Council [1945] 2 All E.R. 243 at page 251.

estoppel was limited to statements of facts has long since disintegrated and for example, mixed statements of fact and law have been treated as subject to estoppel[35]. and there has been a tendency to treat many clear statements of law as subject to estoppel.[36].

A question of the validity of a written contract would normally be treated as a matter of law. However in both Taylors Fashions v Liverpool Victoria Trustees Co. Ltd. and in Amalgamted Investment and Property Co. Ltd. v Texas Commerce International Bank Ltd., where the estoppel was raised upon the validity of an option and a guarantee, respectively, the court found no difficulty in applying estoppel. Citing the opinion of the Privy Council in Yorkshire Insurance Co. Ltd. v Craine[37]. where the Board regarded it as a matter of indifference whether the representation was that the claim made was actually valid, which was a question of law, or that it was the insurers' intention to treat it as valid, which was a matter of fact, Oliver J. in Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. concluded;

> 'In a sense most representations of law can be approached on the footing that, whatever the law may be, it is the

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35. As in Burrows v Rhodes [1899] 1 Q.B. 816;

36. As in Reynell v Sprye (1852) 1 De G.M. & G. 660, where a statement that the representee took no interest under a will was treated as a statement of fact: in Bank of Australasia v Adams (1890) 8 N.Z.L.R. 119, the bank was estopped in respect to a representation as to the binding effect of a bond. In Lyle-Mellor v A. Lewis & Co. (Westminister) Ltd., [1956] 1 All E.R. 247 Denning L.J. was prepared to hold that a representation of law was capable of supporting an estoppel. But the Privy Council held against this view in Kai Nam v Ma Kam Chan [1956] 1 All E.R. 783 n; [1956] A.C. 358.

37. [1922] 2 A.C. 541.

existing intention of the party making the representation to treat the law as it is represented to be as the conventional basis for the particular transaction which he has in mind'[38].

This would appear to subsume any distinction between a representation of law and a representation of fact as a basis for the expectation raised. While it is admitted that Oliver J. did not accord this issue extended treatment it would appear from an examination of the cases that the elimination of the distinction between law and fact as a basis for the expectation is fully in accord with the current tendency to extend the basis for the Ramsden v Dyson principle.

Irrelevant That Expectation in respect to Future Intention or Opinion

Although the courts do not appear to as yet, specifically directed attention to the matter it would appear to be irrelevant that the expectation has been raised upon the basis of an expression of future intention. If having made an expression as to his future intention the representor then engages in conduct, possibly by acquiescence or encouragement, which would induce the representee to believe that that expression of future intention will be fulfilled, then the necessary expectation to support the Ramsden v Dyson principle will be satisfied.

Many specific instances are illustrative of this. In Crabb v Arun District Council[39]. the conduct of the representor council

38. [1982] 1 Q.B. 133 at page 151

39. [1976] 1 Ch. 179.

was surely tantamount to a statement to the effect that 'the right of access which has been agreed upon will be granted in the future'; could not the statement of the representor in Pascoe v Turner[40]. very readily be turned from a categoric representation that 'the house is yours' to 'the house may be yours at some time in the future'. No distinction appears now to be relevant as to the representation of future intention. Indeed it would appear quite contrary to the basic policy of the Ramsden v Dyson principle to exclude expectations which are based upon expression of future intention as subject to the principle.

The requirement of the raising of an expectation would thus appear to contribute still further to the laying to rest the celebrated but much criticised decision in Jorden v Money.[41].

Likewise the status of an expression of opinion as the basis of the expectation does not appear to have received the attention of the courts. However an argument similar to that regarding expressions of future intention could probably be applied to expressions of opinions as bases for the expectation.

It has traditionally been held that a statement of mere opinion is not sufficient to found an estoppel.[42]. But this proposition also could well be subsumed in the raising of the expectation. The basis of the representor's conduct is surely not the opinion but his total conduct in relation to that opinion.

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40. [1979] 1 W.L.R. 431

41. (1854) 5 H.L.C. 185; 10 E.R. 868.

42. See, for example, George Whitechurch Ltd. v Cavanagh [1902] A.C. 117; National Westminister Bank Ltd. v Barclays Bank [1974] 3 All E.R. 834.

If this conduct, irrespective of the expression of opinion is sufficient to raise the expectation then the requirements of the Ramsden v Dyson principle, in respect, that is to the conduct required of the representor, have, it is submitted, probably been met. But, on the other hand, if there is a simple representation of opinion with nothing else then it is probable that the requirement has not been met because there would then probably be nothing to raise the required expectation. In other words it would be reasonable to assume that an expectation could not raise upon an opinion alone.

It is Not Necessary that the Representor Actually Create the Expectation But it is Sufficient if he Merely 'Feed' it.

In order to raise the required expectation it is not necessary that the representor actually create it. The basis of the expectation can come into existence quite beyond the actions or indeed the control of the representor. But if, once having been created,it is enough if the representor feeds that expectation to such an extent that the conduct of the representee is thereby influenced.

This has been emphasised by both Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. and Amalgamated Investment & Property Co. Ltd. (in liquidation) v Texas Commerce International Bank Ltd.

In the latter of those two cases Robert Goff J. in the High Court specifically directed attention to this particular issue;

> '... it is, in my judgment, no bar to a conclusion that the other party's conduct was so influenced, that his conduct did not derive its origin only from the encouragement or representation of the first party. There may be

> cases where the representee has proceeded initially on the basis of a belief derived from some other source independent of the representor, but his belief has subsequently been confirmed by the encouragement or representation of the representor. In such a case, the question is not whether the representee acted, or desisted from acting, solely in reliance on the encouragement or representation of the other party; the question is rather whether his conduct was so influenced by the encouragement or representation ... that it would be unconscionable for the representor thereafter to enforce his strict legal rights'.[43.]

This indicates, quite vividly, the extent to which the courts are now prepared to stretch the conduct required of the representor in order to allow the Ramsden v Dyson principle in. It would appear to say, firstly, that the representor need not actually bring the basis of the expectation into existence. Secondly, accepting that the substance of a possible expectation is in place, any conduct of the representor, intentional or otherwise, which can be construed as 'feeding' that expectation will suffice to allow the principle in. The only proviso being that it must 'be unconscionable for the representor thereafter to enforce his strict legal rights' That is the Ramsden v Dyson principle can be called into aid if the representor attempts to resile from the situation when it would be unconscionable, viewed substantially in terms of the position of the representee, to do so.

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43. [1982] 1 Q.B. 84 at pages 104-105.

Having Created the Expectation the Representor Must Then Resile From It

Once having created the expectation in the mind of the representee the representor must then commit an act in contradiction to the expectation. This is an act which serves to disintegrate the expectation which he has previously created. To put the matter in other words there must be a discrepancy between the expectation and what the representor subsequently alleges or sets up in litigation between himself and the party claiming the benefit of the Ramsden v Dyson principle. The subsequent conduct of the representor must be such that its effect is to destroy the expectation which he earlier raised.

This aspect has not generally caused much in the way of difficulty to the courts and in most instances is relatively clear cut. In many cases where the representee has been allowed into possession of property with an expectation that he can remain in possession the resiling will merely be the subsequent attempt to remove the representee from the property.

Conclusion: Expanded Scope For the Ramsden v Dyson Principle as Against other Forms of Estoppel

If the Ramsden v Dyson principle can be established as resting upon the raising of an expectation it can be seen as having a much wider scope than other heads of estoppel.

A comparison with estoppel by specific representation will show the scope of the Ramsden v Dyson principle as compared with that basis as the starting point of the action. It has been maintained that in order to succeed in estoppel by representation the representation must be precise, not an expression of opinion, or

future intention, and an expression of existing fact and not law. Requirements of this complexion serve to dramatically limit the scope of estoppel by representation in throwing up almost insuperable barriers to the success of the representee.

The Ramsden v Dyson principle, on the other hand, allows the representee a much greater scope in requiring only that he show that the representor raised an expectation which was such as would influence any reasonable man, that he then sought to resile from that expectation, and that as a result he (the representee) would suffer detriment. The representee is therefore required to direct his proof not to bringing the representation under a series of predetermined rules, but to showing that the facts of the instant case were such as to give rise to the required expectation. As has been indicated it is possible that part of this proof of the required expectation could include a specific representation by the representor.

Chapter eight

DETRIMENT TO THE REPRESENTEE

Introduction: Is Detriment to the Representee a Separate Requirement or Merely a Part of the Wider Requirement of Unconscionability?

The requirement of some detriment to the representee before the Ramsden v Dyson principle can be applied in his favour has assumed varying degrees of importance. A few cases can be seen as having been decided substantially upon this point while in others it has played a negligible, if not non existant role. The result is that it is not clear whether detriment to the representee is a specific requirement of the principle or whether it is merely but one aspect of the wider test of unconscionability. In other words does the court look to the position of the representee and determine whether he has detrimentally relied upon the expectation of the representor and, if the answer to that examination is in the affirmative, then move to the conclusion that the test of unconscionability has been satisfied? While it is true that in many instances the detriment of the representee will be a vital factor in the determination of the presence of unconscionability it is possible to conceive of cases where the court may be prepared to consider wider factors and conclude that a situation is unconscionable despite that there is no detriment to the representee.

Conversely there are many cases upon record where although the representee has clearly suffered detriment in a specific situation, the test of unconscionability has not been satisfied for the simple reason that the detriment of the representee can in no way be ascribed to the conduct of the representor. That is the representor has not committed the requisite fraud.

At the same time no specific tests have been laid down as to what constitutes sufficient detriment and this means that detriment can be highly subjective to the individual judge and idiosyncratic to the individual case. It is thus possible to contrive some detriment to the representee in virtually any case where the wider test of unconscionability is satisifed.

Some may therefore be inclined to argue that it may not be important what terminology is used to determine whether the representor is bound by his representation. Unfortunately the matter cannot be disposed of so readily because the cases do tend to throw up the two concepts as distinct. There is here a quite noticable cleavage between the decisions of the New Zealand Judges and their English counterparts. The former tending to be somewhat more insistent upon the requirement of some detriment while the latter tending to adopt the wider test of unconscionability. Also there has been clear judicial recognition of a possible distinction between the two concepts. [1.]

Theoretical Justification for the Requirement of Detriment in Equity

In order to resolve the question of whether there is a need for a specific requirement of detriment to the representee it is tempting to examine the old cases in order to try and find some justification for the requirement in the origins of the Ramsden v Dyson principle.

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1. Such a distinction was for example recognised by Lord Salmon in Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyds Rep 109 at page 127; by Robert Goff J. in Societe Italo -Belge pour le Commerce et I'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd "The Post Chaser" [1982] 1 All ER 19 at page 26; by Lord Denning M.R. in W.J. Alan & Co Ltd v El Naser Export and Import Co [1972] 2 QB 189 at page 213, [1972] 2 All E.R. 127 at page 140.

Unfortunately such an exercise does not bear much fruit. The older cases tend to make little if any reference to a specific requirement of detriment but use the wider 'unconscionability' or 'inequitable' [2]. The phenomenon of detriment appears to be a creation of much more recent times following the implementation of the judicature system.

Despite, this, however, it is possible to contrive detriment to the representee in virtually every case where estoppel was successfully pleaded within the original jurisdiction. [3] Equity, before it would assert jurisidction required the raising of an equity in favour of the person who was seeking assistance. An integral part of that equity would be some prejudice or detriment to the representee. If the representee had suffered no loss or clearly stood to suffer no loss, if the representor was permitted to assert his legal rights, then there was no need for equity to assert jurisdiction.

But equity did not give a clear answer to the question of the extent to which the prejudice suffered or likely to be suffered by the representee featured in the overall assessment of unconscionability. Despite this the more recent decisions clearly reveal the evolution of a requirement of detriment which, as the law stands at present, appears as a more specific requirement related to the position of the representee, than the wider unconscionability.

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2. This is especially evident in the cases founding the High Trees principle; Hughes v Metropolitan Railways (1887) 2 AC 439, Birmingham and District Land Co v London and North Western Rail Co (1888) 40 Ch. D. 268.

3. As most of those cases dealt with land the detriment of the representee could be related to the subject matter of the property. Equity usually intervened to prevent the representee from being evicted from the property in circumstances where he would clearly suffer prejudice by being evicted; as for example, where he had improved the property with the knowledge of the landlord as in the Earl of Oxford's Case (1615) 1 Ch. Rep. 1, 21 ER 485, East India Company v Vincent (1740) 2 Alk. 83, 26 ER 415.

Attention will thus be focused upon the requirement of detriment, and its nature and incidents, before reverting back to an assessment of the relationship between detriment and unconscionability and whether the latter merely flows from the former.

No Clear Distinction in Respect to Detriment as Between Different Heads of Estoppel

No clear distinction has yet emerged in respect to the nature of the detriment required as between the various heads of estoppel. There are indications of a requirement of detriment as essential to the establishment of the several different 'breeds' of estoppel and it is not possible to discern any clear differences in the nature of the detriment as between them. This means that it seems quite acceptable to assume that detriment seen as essential to, for example, the establishment of High Trees estoppel, would be equally applicable to the Ramsden v Dyson principle.

The requirement of detriment would appear at first sight to be substantially an equitable concept but there is no doubt that from the earliest times there are indications that detriment was required as an ingredient of common law estoppel. [4] Most of the contemporary cases where detriment has been considered relevant have, indeed, involved heads of estoppel other than the Ramsden v Dyson principle, but it is submitted that until some clear differentiation is made between the various heads of estoppel decisions made in respect to other heads on the matter of detriment are equally applicable to the Ramsden v Dyson principle.

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4. See for example the foundation case of estoppel by representation Pickard v Sears (1837) 6 Ad. & E. 469, which was at common law, and which clearly specified detriment as an ingredient of that head of estoppel. Moreover the concept of detriment is not limited to estoppel. It is clearly a requirement in other areas of law, as for example in the doctrine of part performance, see Viscount Dilhorne in Steadman v Steadman [1974] A.C. 53 6, at page 555. Also there is an increasing tendency for it to be incorporated into statute in New Zealand, see, in particular section 94B Judicature Act 1908, section 9 (6) of the Contractual Remedies Act 1979.

However Lord Denning has expressed the view that where there has been a specific representation it is sufficient merely if the representee acts upon the representation, that is he has conducted his affairs on the basis of the representation and that it is immaterial whether he has suffered any detriment by so doing. [5.] He thus sees a clear distinction between the requirement in cases of an express representation where simple acting on the promise may suffice and cases of acquiescence where detriment may be a requirement. [6.] This distinction does not seem to have received widespread acceptance but was recognised by Robert Goff J in Societe Italo-Belge v Palm Oils. [7.]

For Detriment to be Effective it Must Have Been Sustained in Reliance Upon the Representation of the Representor.

It will avail the representee nothing in his attempt to call the Ramsden v Dyson principle into aid unless he can show that that detriment was incurred as a direct result of him relying upon the representation which has been made by the representor. It is not sufficient if he would have incurred the detriment irrespective of the conduct of the representor. In other words the representee must show not simply detriment but detrimental reliance. He must show a clear nexus between the representation of the representor and the detriment which has befallen him or which he is likely to suffer.

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5. c.f. W.J. Alan & Co Ltd v El Nasr Export and Important Co [1972] 2 Q.B. 189 at page 213.

6. Seealso (1952) 15 M.L.R. 1 at page 5.

7. Supra at page 26

This point would appear to be well established and can be illustrated clearly in cases concerning landlord and tenant;

> '... a lessor knowing and permitting those acts, which the lessee would not have done ... but upon an expectation, that the lessor would not throw an objection in the way of his enjoyment' [8.]

Where the lessee is already in possession it is therefore necessary to distinguish detriment, possibly in the way of expenditure, resulting from the current enjoyment of the property, which is not sufficient to amount to detrimental reliance, as against expenditure in anticipation of a larger interest, which the lessee is seeking to secure by invoking the Ramsden v Dyson principle. If the lessor has fostered an expectation of this larger interest any outlay in anticipation of it could amount to sufficient detriment.

For this reason the representee in Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [9.] failed because the detriment which he claimed, in the form of expenditure for the installation of a lift, was referable to an existing lease of the building which the representee held and the belief that there was a validly exercisable option was not in any way created or encouraged by the representor.

Again in the New Zealand High Court in Denny v Jensen [10.] the representee experienced difficulty in relating the detriment which he there claimed, in the forms of expenditure to the property, to the conduct of the representor because the latter was able to claim that he believed it related to the tenancy which the tenant representee denied and not to an expectation of the transfer of the fee simple via a contract of sale which

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8. As per Lord Eldon L.C. in Dann v Spurrier (1802) 7 Ves. Jun 231 at page 236; also in Willmott v Barber (1880) 15 Ch. D. 96, where the same point arose Fry J. felt unable to say that the expenditure was incurred on the faith of the option rather than on the faith of the plaintiff's existing possession of the land on which the building took place.

9. [1982] 1 Q.B. 133 [1981] 2 W.L.R. 576.

10. [1977] 1 N.Z.L.R. 635.

the tenant was trying to establish. The conduct of the representor had not contributed to the detriment of the representee.

On the other hand it has been held sufficient in some cases that an active alteration of position may not be necessary and that it could be sufficient "... if the person to whom the statement is made rests satisfied with the position taken up by him in reliance ..." [11].

Uncertainty as to the Standard of Proof of Detriment

Considerable uncertainty still persists as to the burden of proof and the standard of proof of detrimental reliance. This issue has surfaced in several recent decisions. Significantly the requirements as to the burden and standard of proof have tended to fluctuate in accordance with the overall tendency of the judge to allowing the principle or disallowing it.

Two quite distinct aspects of proof present themselves. There is firstly the onus of proving that the acts which are relied upon as detriment have flowed from the representation and the standard of proof there required. Secondly there is the proof that those acts did, in fact, amount to actual detriment in the instant situation.

There is clear conflict as to the required proof in the first aspect. According to Lord Eldon L.C. '... it must be put upon the party to prove that case by strong and cogent evidence: leaving no reasonable doubt, that he acted upon that sort of encouragement' [12]. According to this the representee must show beyond any reasonable doubt that he acted upon the representation. This high standard was reiterated by White J. in the New Zealand High Court in Denny v Jensen [13].

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11. As per Farwell J in Duncan v Kennaway and Co [1900] 1 Ch. 833 at page 838 cited with approval by North J in Inland Revenue Commissioners v Morris [1958] N.Z.L.R. 1126 at page 1138.

12. Dann v Spurrier (1802) 7 Ves. Jun. 231 at page 236.

13. [1977] 1 N.Z.L.R. 635 at page 639.

On the other hand Lord Denning M.R. adopted a completely different approach to the matter of proof. According to him '... once it is shown that a representation was calculated to influence the judgment of a reasonable man, the presumption is that he was so influenced' [14]. Thus if the representor has made a representation which is of such a nature that any reasonable man could be expected to act upon it, to his detriment, and indeed the representee so acts, it is then upon the representor to prove that the conduct of the representee was not influenced by the representation. In other words the onus is upon the representor to rebutt the presumption that the representee was influenced by the representation. Doubts can be cast upon this very low requirement as to proof placed upon the representee by Lord Denning. Indeed Waller L.J. also in Greasley v Cooke appears to demand a somewhat greater requirement of proof from the representee and does not allow the representee the benefit of a presumption. According to Waller L.J. 'If the defendant is to succeed she has to prove that she acted to her detriment as the result of her belief'[15].

Turning to the second aspect of proof it appears clear that once it is established that the representee did act upon the representation, the onus is upon him to prove that, in the instant circumstances, the acts alluded to did, in fact, amount to a detriment to him. [16].

In regard to the actual standard of proof required to secure the necessary detriment the decisions so far do not proffer much in the way of specific guidelines. The decisions appear to indicate that generally, apart that is from the decision of the New Zealand High Court in Hollidge v Bank of New Zealand [17]. that this standard is not set very high. In

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14. Greasley v Cooke [1980] 3 All E.R. 710 at page 713 citing from his own judgment in the earlier case of Brikom Investments Ltd v Carr [1979] 1 Q.B. 467.

15. [1980] 3 All E.R. 710 at page 710 citing with approval from the judgment of the Court below.

16. 'It is I think clear that the onus of proof under s 94B rests on the payee. It is for him to demonstrate that repayment would be inequitable' as per Hardie Boys J. in Hollidge v Bank of New Zealand (High Court, Nelson, 28 March 1982, (M 1840) page 9)

17. supra.

this aspect the English decisions appear to indicate a cleavage from the New Zealand. While the English judges have accorded little consideration to this issue and apparently require only a minimal standard of proof the very few New Zealand cases seemingly indicate a much high standard of proof. As indicated above this may reflect differing overall attitudes to allowing estoppel. [18.]

A Contingent Detriment Will be Sufficient

It is clear that the prejudice to the representee can be potential and need not be actual or liquidated, in order to satisfy the requirement of detriment. This was aptly illustrated by the Court of Appeal decision in Greasley v Cooke [19.] where the representor had attempted to plead that there had been no detriment to the representee, in ordering her from the house property in dispute, because she had not outlayed any expenditure on the property.

Lord Denning M.R. in rejecting Snell's proposition that 'A must have incurred some expenditure or otherwise have prejudiced himself' [20]. did not consider such expenditure necessary but regarded it sufficient 'if the party to whom the assurance is given acts on the faith of it, in such circumstances that it would be unjust and inequitable for the party making the assurance to go back upon it' [21.]

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18. C.f. e.g., the decision of the New Zealand High Court in Hollidge v Bank of New Zealand supra, with that of the English Court of Appeal in Avon County Council v Howlett (1983) 1 All ER 1073, on very similar facts. Both these cases are referred to infra, ibid chapter. For a consideration of what would amount to adequate detriment see under the subheading 'The Nature of the Detriment Required' ibid chapter, infra. This will indicate the relatively limited nature of the detriment required as well as the somewhat contradictory factors within it.

19. supra

20. 27 edition page 565.

21. As per Lord Denning M.R. [1980] 3 All ER at page 713.

This confirms the expectationary or contingent nature which the detriment can assume. It is not only the loss which the representee has sustained so much as the potential loss which he might sustain should the representor be permitted to resile. [22.]

It is no barrier to the successful pleading of detrimental reliance that the representee has imposed upon the benevolence of the representor, or that a mutually satisfactory relationship of a social nature has subsisted between the parties for years. [23.] It is no barrier that the representee has benefited from the representations and made all that he possibly could from the desirable situation which the representor had created. The detriment is sustained in the prejudice which would result to the representee from the breaking of the relationship between the parties, provided, that is, that the break will result in the representor resiling from the expectation which he has raised in the mind of the representee.

That detriment can be based upon contingent loss was clearly brought out by Lord Denning in Greasley v Cooke. However the other two judgments which were handed down in that case do not directly stress this point. [24.]

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22. It would appear that this approach to the detriment necessary differs somewhat from that required to secure the part performance of a contract, where, it seems, that something more in the nature of an actual liquidated detriment must exist before specific performance will be decreed; see for example Steadman v Steadman [1976] A.C. 536, Lord Reid at page 540, and Lord Simon at pages 558 and 565.

23. In many instances, for example, the representee had been in possession of the property of the representor and had resided in the property for years at little or no expense; Greasley v Cooke [1980] 3 All E.R. 710; Pascoe v Turner [1979] 2 All ER 945; Inwards v Baker [1965] 2 Q.B. 29.

24. Indeed Waller L.J. would appear to support the view that detriment must be based upon what has been done, see [1980] 3 All E.R. at page 714.

It must be admitted that basing the required detriment upon a possible contingent liability is not without its difficulties. There does not appear to be much in the way of authority to support Lord Denning's view.[25] What he has done is to substitute an injustice and an inequity for actual detriment. This could mean that a very substantial amount of judicial discretion would enter into the assessment of any possible potential detriment and it would seem not to be possible to lay down clear rules whereby executed acts could be assessed as to whether or not they qualified as sufficient detriment. Such an exercise probably could be carried out if the detriment was based upon an actual sustained loss. As the law stands at present the issue of detriment is very substantially one of fact.

One decision which shows the difference between the requirement of an executed detriment as against a contingent detriment is that in Crabb v Arun District Council[26]. The landowner representee, in reliance upon a representation made to him by the District Council, that he would be granted access over Council property to a block of land which he owned, sold off another piece of property which meant that he was entirely upon the access promised by the Council. The Council then resiled from the representation which it had previously made. It is difficult to see that the representee could have recovered upon the basis of executed detriment because he had simply not sustained any. His detriment, which was the possible loss of any access at all to his land, was completely contingent upon the Council not granting the access which it had promised.

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25. Lord Denning did cite by way of support the two recent Court of Appeal decisions upon which he deliberated, Moorgate Mercantile v Twitchings [1976]Q.B. 225, Crabb v Arun District Council [1976] 1 Ch. 179. This approach emphasising contingent detriment would also appear to be supported by Dixon J. in the High Court of Australia in Grundt v The Great Boulder Pty Gold Mines Ltd (1938) 59 CLR 641, where he said '... the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it' This was cited with approval by Hardie Boys J. in the High Court of New Zealand in Hollidge v Bank of New Zealand (High Court, Nelson, 28 March 1982 (M 1840) at page 5)

26. [1976] Ch. 179

Although neither Crabb v Arun District Council nor Greasley v Cooke appear to have been brought to the attention of the New Zealand High Court in Hollidge v Bank of New Zealand the approach of Haride Boys J. in that case would appear to confirm the approach of Lord Denning that detriment can be based upon a contingent loss. [27.]

The Nature of The Detriment Required

Understandably the courts have not sought to restrict in any way the actual acts which can amount to detrimental reliance. It being an issue of fact the representee is granted virtually an open ended option as to what he submits as being to his detriment.

Although in many instances the expenditure of money is relied upon [28.] it is clear that 'that is not a necessary element' [29] The expenditure of money could amount to a sufficient detriment if, by resiling from his representation, the representor would prevent the representee from enjoying the benefit of his expenditure. But the required detriment is most certainly not limited to a situation in which the representee has expended money.

There is a consistent line of authority to the effect that the prospect of the removal of a representee from possession of a house property following representations to the effect that he would be permitted to remain in occupation, will amount to sufficient detriment. [30.] This can also apply to other property, such as a farm. [31.]

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27. For a more detailed consideration of Hollidge v Bank of New Zealand see under the subheading 'The Nature of the Detriment Required' ibid chapter, infra.

28. As in Pascoe v Turner supra but this was accompanied by the prospect of the loss of possession of the property should the legal rights of the representor be permitted to prevail.

29. As per Lord Denning in Greasley v Cooke supra at page 713.

30. See e.g. Pascoe v Turner (supra) Inwards v Baker [1965] 2 Q.B. 29; Griffiths v Williams (1977) 248 E.G. 947.

31. As in Beech v Beech (High Court, Wellington, 24 February 1982, (A No. 144/80) Jefferies J.)

Detrimental reliance could also arise where the representee, relying upon the representation, disposes of part of his land without being able to obtain access to the remainder except over the land of the representor. That is the prospect of the land being rendered unless by the discarding of the representation can suffice.[32.]

The question is raised as to whether the detrimental reliance must be of such a nature as to clearly relate to, the property which is the subject matter of the dispute.[33.] While it is true that most of the successful cases have involved situations where the detriment can be related to property which stands at the centre of the lis, there is no clear judicial indication that the concept is so limited, and the fact that most successful representees have related their detriment to property could well be the result of what might be termed simple 'situational logistics'. It is usually much easier to demonstrate detriment, when for example, one is in possession of property and could be required to move than in a case where one is seeking the performance of a promise which is completely executory, that is has not been acted upon at all. In Habib Bank Ltd v Habib Bank AG Zurich[34.] the Ramsden v Dyson principle was called into aid to provide a defense against an action in the tort of passing off. The detriment which would have been suffered there by the representee, had he not succeeded, rested in him not being permitted to continue to use the name of the Bank which the representor had permitted him to use for some years. There would no doubt have been some financial loss and disruption to the business activity of the representee.

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32. As in Crabb v Arun District Council (supra)

33. C.f. the doctrine of part performance where the delivery and acceptance of the property, the subject matter of the contract, in other words the fact that the contract was executed, was generally regarded as conclusive part performance, sufficient to allow the doctrine in and thus enable the court to grant a decree of specific performance.

34. [1981] 2 All ER 650, see also Pascol Ltd v Trade Lines Ltd [1982] 1 Lloyd's Rep. 456.

Hollidge v Bank of New Zealand [35.] provides one of the few instances where detrimental reliance has received relatively definitive treatment by the courts. This was an action not involving real property and was decided against the representee. In Hollidge v Bank of New Zealand the Bank had incorrectly credited the sum of $1,133.68 to the account of its customer Hollidge, who was the representee. Hollidge had telephoned the Bank to query the credit and it was confirmed by a clerk of the Bank that it was 'his money' His grandmother had died in England about a year before and he believed that the amount could have been a bequest from her will. He then proceeded to spend the money upon, paying off creditors, ordinary living expenses, and the purchase of a new machine for his wordworking business. The amount had been credited to the representee's account in April 1978 and it was not until January 1979 that the error was discovered whereupon the Bank immediately debited the account and allowed the representee overdraft accommodation to a limit of $1.150 and it payed another two cheques of the representee. Thereafter the representee did not operate the account and the Bank sought to recover, in an action based upon quasi contract, the debit balance in the representee's account. The representee raised the defences of estoppel and section 94B of the Judicature Act 1908.

There is no doubt that a clear representation was made in this instance. The entry in the bank statement, which was confirmed by the telephone conversation, was conceded as sufficient to found an estoppel. Indeed 'counsel were agreed and that all the ingredients necessary to constitute such an estoppel existed in this case save one' [36.] The one that was missing was that 'the representee has in some way acted to his prejudice on the faith of his supposed right to enjoy the benefit of such payments or credits' [37.]

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35. (High Court Nelson, 28 March 1982 (M 1840) Hardie Boys J)

36. Supra at page 3

37. per Hardie-Boys J. citing with approval Spencer-Bower and Turner 'Estoppel by Representation' 3rd ed. London, Butterworths, 1977 page 296. Ibid.

The District Court, which had heard the issue at first instance , held that this requirement had not been met because the appellant had not satisfied the Court that 'as a consequence of the representation he had altered his mode of living' nor had the appellant satisfied the Court that it would be inequitable for him to be required to repay the money.

The decision of the High Court in Hollidge v Bank of New Zealand rested substantially upon one authority and that was the decision of the Queens Bench Division in United Overseas Bank v Jiwani.[38] This was a decision of Mackenna J. which had virtually identical facts with Hollidge v Bank of New Zealand, and where it was held that the representee must show;

> '... that because of his mistaken belief he changed his position in such a way which would make it inequitable to require him now to repay the money' [39]

According to Mackenna J. three previous cases in which detrimental reliance was successfully pleaded could be distinguished from the present case;

> 'There was reason for believing in each of these cases that the defendant would have acted differently if he had not mistakenly believed that he was richer than he was, that because of his mistake, he had, to use Goff & Jones words (The Law of Restitution 2nd ed p. 555) altered his mode of living. There was the further fact in Holt's case that the defendant had invested part of the overpayment in a company which had since gone into liquidation' [40]

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38. [1977] 1 All E.R. 733.

39. As per Mackenna J. in United Overseas Bank v Jiwani [1977] 1 All E.R. at page 737, cited with approval by Hardie Boys J. in Hollidge v Bank of New Zealand, cited supra, page 3.

40. As per Mackenna J. ibid at page 737 cited with approval by Hardie-Boys J. in Hollidge v Bank of New Zealand ibid at page 4 of judgment.

Hardie-Boys J. confirmed the proposition set out supra that the true test of detrimental reliance is whether or not it would be inequitable to now require the representee to repay the money.[41.] He concluded that the mere spending of the money was not sufficient to establish the requisite detriment nor was it relevant that the representee had altered his mode of living. The basic issue according to Hardie-Boys J. was thus whether or not the representee would suffer detriment by being required to repay the money. This being an issue of fact the Court concerned itself with the itemisation of the expenditure which had been outlayed by the representee and the nature of the debts which he had repaid as well as the effect of the purchase of the machinery for his business.

This decision emphasises that the onus of establishing the required detriment is upon the representee. He must show whether, should the situation be reversed, he would suffer. To what extent this suffering must exist before the requisite detriment is established is not by any means clear. Thus the reversability of the situation was regarded as a crucial factor and the effect of restoration upon the representee highly relevant. This situation thus was quite different from that, say, in Crabb v Arun District Council, where the failure to grant the access way would have had a permanent effect in rendering useless the land of the representee. It could not have been possible to argue such a situation in Hollidge v Bank of New Zealand.

At the same time it is not easy to reconcile this decision with others where the courts have, for example, considered as adequate detriment the prospect of losing occupation of a house property. Surely the inconvenience of having to repay funds is just as great as having to find alternate accommodation.

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41. Citing with approval from Grundt v The Great Boulder Pty. Gold Mines Ltd (1938) 59 C.L.R. 641;

> '... the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted which led to it'

Also there is a very substantial element of subjectivity in the decision. It could be assumed, for example, that the financial status of the representee would be relevant. A wealthy customer would be more capable of effecting restoration than a poorer customer. It would be less inequitable that a rich man should be called upon to satisfy restoration as against the same demand being made of a poor man. Paradoxically it appears possible that Hollidge might have been more successful in pleading detriment had a very large sum, which he could never possibly have repaid, been credited or if he had completely lost the money in a gambling bout. Moreover the minute consideration which the Court found compelled to make, of the financial state of the representee does not appear to be a very firm foundation upon which to build durable and broadly applicable legal principles.

It would be very difficult to ascertain the point at which the detrimental reliance crystallises to the extent that it can be rectified only be the permanent exclusion of the rights of the representor. [42.] The prospect of the rectification of the detriment and the resumption of the status quo means that the detriment to the representee would have to be measured very delicately against the detriment to the representor in having his rights permanently expunged. The reversability of the situation does not appear to have been given much consideration in previous cases. [43.] However in Norfolk County Council v Secretary of State for the Environment [44.] where the Council was able to cancel an order which it had made for machinery and thus revert to the status quo this did provide a basis for the finding of the Court.

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42. C.f. Fung Kai Sun v Chan Fui Hing [1951] A.C. 489.

43. C.f. the operation of detrimental reliance in cases dealing with the applicability of the doctrine of part performance in contract. Although it is generally conceded that some detriment is required of the party seeking specific performance the courts have never been inhibited in applying the doctrine even when it was clear that the position of the parties could very readily have been restored to what it had been before the conclusion of the contract.

44. [1973] 3 All E.R. 673.

It seems that extraneous forces entered into the judgment in Hollidge v Bank of New Zealand. It could be argued that the Court was there concerned to maintain a balance between unjust enrichment on the one hand as against detriment to the representee on the other. There would appear to be a general move on the part of the New Zealand Courts to limit any evolution of a broad head of law which would permit unjust enrichment. [45.] It is true that here the Bank simply made a mistake and it is not unreasonable to conjecture the possibility of some vast sum being credited to an account in error, thus giving the customer an unwarranted windfall. [46.] Significantly the precedents resorted to in both Hollidge v Bank of New Zealand and United Overseas Bank v Jiwani did not extend to cases beyond the banking arena and it would be possible to limit the precedent effect of Hollidge v Bank of New Zealand to cases dealing with banking and suchlike activity. But there is nothing, of course, to prevent these rules being extended to a wider arena. [47.]

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45. [1979] 2 N.Z.L.R. 124, and especially at page 144 et seq.

46. This consideration appears to be more evident in Overseas Bank v Jiwani, where Mackenna J. did, for example put to counsel for the representee the possibility of the representee purchasing a gilt-edged security which rose in value as between the time of purchase and the time the error was discovered. With respect it would appear that, assuming the amount of the incorrect credit was recoverable by the bank, any profit made by the representee dealing with the money would have given rise to a constructive trust in favour of the bank.

47. One is inclined to conjecture whether the customer would have been any more successful had he based his action upon simple tortious negligence on the part of the bank. Most certainly in Hollidge v Bank of New Zealand the representee had attempted to confirm the accuracy of the balance and this ought surely to have been sufficient to place the Bank upon inquiry and that fact that it took no inquiry would appear to indicate negligence. The preference for estoppel as against negligence would probably rest in the proof of a duty of care on the part of the bank which would have been necessary for a successful action in negligence. For a further explanation of the high standard of detriment required, in Hollidge v Bank of New Zealand see under subheading 'Conclusion Detriment and Independent Requirement etc' ibid chapter, infra.

Taking an overall view of the decision in Hollidge v Bank of New Zealand the conclusion which one must arrive at is that the representor Bank appears to have been placed in a somewhat favourable position as compared with the representors who have been prepared to allow the representee into possession of property. [48.]

It has been held that a mere act of indulgence is insufficient and there must be a clear alteration of position in reliance upon the waiver. Thus in the New Zealand case of McCathie v McCathie [49.] the remission of part of the purchase price of a farm was held insufficient. In view of subsequent decisions it is submitted that this view is too narrow and that a vital consideration is the detriment likely to ensue to the representee from being compelled to restore the waiver.

No Division of the Detriment; Unjust Enrichment May Arise Because No Pro Tanto Effect of Estoppel.

The decision of the New Zealand High Court in Hollidge v Bank of New Zealand can be contrasted with that of the English Court of Appeal in Avon County Council v Howlett. [50.] The facts were somewhat similar. The representor County Council had made overpayments of wages to its employee, Howlett, who was the defendant in the action, for the restitution of the money paid by mistake. The conditions for estoppel by representation had been satisfied. However when assessing detriment it was found upon the evidence, that it would not be unjust for the representee to be required to repay part of the overpayment. That is that part which he had not spent, as only part of the money had been expended, and the balance remained in a bank account.

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48. As for example in, Inwards v Baker [1965]2 Q.B. 29 Griffiths v Williams [1977] 248 E.G. 947; Pascoe v Turner [1979] 2 All E.R. 945; Greasley v Cooke [1980] 3 All E.R. 710; Beech v Beech (High Court Wellington 24 February 1982, (A No. 144/80) Jefferies J).

49. [1971] N.Z.L.R. 58.

50. [1983] 1 All E.R. 1073.

But the Court of Appeal found itself unable to apply estoppel so as to have a pro tanto effect which meant that the representee was not required to repay any amount of the overpayment of wages. The end result was that the representee enjoyed unjust enrichment, a result of the mistake of his employer, to the extent of that part of the overpayment which, without injustice, he could well have repaid.

In other words the Court found itself unable to partition the detriment as between the parties. According to Cumming-Bruce L.J. '... it is not easy to determine whether and when the court will restrict the effect of an estoppel if to apply it with the full rigour will clearly produce injustice' [51]. He went on to point out that in R.E. Jones Ltd v Waring & Gillow Ltd [52] Viscount Cave L.C. 'evidently thought that the court should find a way of preventing a party so using estoppel as to make a profit' [53].

The approach of the Court of Appeal in Avon County Council v Howlett can be seen in contrast so that of the New Zealand High Court in Hollidge v Bank of New Zealand. Although it was clearly aware of the need to establish detriment, and, indeed, did allude to the somewhat destitute position of the payee representee, it did not engage in the prolix assessment of the position of the representee which was found necessary by the New Zealand Court. Instead it took a much broader view of the situation.

One is inclined to conjecture what the position would have been had the payee stood to gain a considerable fortune as a result of the overpayment. There does not appear to be any theoretical objection to the court engaging in a partitioning of the detriment. There must surely be situations where the detriment suffered by the representor must become relevant and be taken into account by the court. This would be especially true in cases where the representor stood to suffer a greater loss than that of the representee.

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51. ibid at page 1075.

52. [1926] A.C. 670. [1926] All E.R. Rep 36.

53. [1983] 1 All E.R. at page 1075.

The quite flexible remedies which have been devised to satisfy the equity when estoppel had been successfully pleaded would indicate that the same degree of flexibility could be exercised in this area and the detriment opportioned as between the parties. In Avon County Council v Howlett this would have resulted in the employee being required to repay only a part of the overpayments which he had received by mistake.

The Nexus Between the Res Gestae and the Representation.

Usually the detriment which the representee complains of will derive from the res gestae - things done - in reliance upon the representation of the representor. It is essential that there should be a connection between the conduct of the representor and the acts which the representee had executed in reliance upon that conduct, and which give rise to the detriment. There must be a causal relationship between the representation, which is the subject of the estoppel and the acts of the representee performed in reliance upon that representation. The representee must have suffered detriment while acting upon the representation of the representor; it is not sufficient if the detriment is suffered while acting upon his own belief. [54]. Also it is not sufficient if the representation merely provides an occasion for the conduct of the representee. The representee must, if he is relying upon a mere representation, show that it was because of the representation of the representor that he suffered loss. To illustrate the requirement in the converse; that had not it been for the representation he would have suffered no loss. [55]. It is not sufficient if the representee would have

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54. Western Fish Products v Penwith District Council [1981] 2 All E.R. 204, at page 217.

55. According to Spencer-Bower and Turner 'The Law Relating to Estoppel by Representation' 3rd. ed. London, Butterworths, 1977, paragraph 76, a causal relationship is equally applicable in those cases where silence is relied upon by the representee as in those instances where he relies upon an express representation.

taken the action in any event, irrespective of the representation. [56.]

It would appear that a quite high standard is required in the proof of the causal connection. The courts can require a clear and strict relationship between the two to be proved. [57.] But there has been no attempt to extend this relationship to the level of sophistication of the 'unequivocally referable test' as has been required in the application of the doctrine of part performance in the common law of contract.

The causal connection would appear, in many cases, to merge into the detrimental reliance itself. Had the representee customer in Hollidge v Bank of New Zealand, for example, been a man of substance and been able to meet all the commitments, which he had in fact met from the amount of the incorrect credit to his account, from other sources, and simply left the incorrect credit in his account, neither the detrimental reliance itself nor the causal relationship would have come into existence.

Had the representee left the amount in the account but entered into commitments with other funds upon the understanding that he had the amount in his account it would probably have been very difficult for him to prove any causal connection because the decision to enter into the committment because the incorrect credit stood in his account would have been entirely subjective to his mind and may not have lent itself to any external evidence. Problems of this nature which can face the representee in his proof of causal connection were brought out by Oliver J. in Taylors Fashions Ltd v Liverpool Victoria Trustees Co. Ltd. (1981)2 W.L.R. 576, where the

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56. 'He (the representee) said he bought timber which was necessary in any event' as per Hardie-Boys J. in Hollidge v Bank of New Zealand supra at page 7.

57. '... the appellant had not satisfied him that he had as a consequence of the representation "altered his mode of living"'
as per Hardie Boys J. in Hollidge v Bank of New Zealand supra, at page 3 of judgment.

and

'... he must show that because of his mistaken belief he changed his position
ibid, citing in support MacKenna J. in United Overseas Bank v Jiwani [1977] 1 All E.R. 733 at page 737.

representee sought to proffer as detrimental reliance, expenditure upon business premises which he claimed he had undertaken in the expectation of having the right to exercise an option for a renewal of the lease. But as Oliver J. stated '... what is there to indicate that the work was undertaken "on the faith of" that belief rather than merely "in" that belief.' [58]. The unexpired portion of the lease had some eighteen years still to run and the res gestae was equally referable to the unexpired portion of the lease, still to run, as to the expectation of the exercise of the option thus giving rise to continued occupation of the premises. Thus assuming that '.... it must be put upon the party to prove that case by strong and cogent evidence; leaving no reasonable doubt, that he acted upon that sort of encouragement' [59]. it would appear that the representee will not succeed in proving the causal connection where his res gestae is equally referable to any other motivating force as well as to the representation of the representor.

No clear rules emerge from the decided cases beyond that some relationship is required to be shown between the res gestae and the representation. As with detrimental reliance itself it would appear in many practical situations it is purely a matter of chance whether the representee is able to satisfy this requirement.

Assessment of Detriment.

Few cases have rested entirely upon detrimental reliance and the one recent decision which was based upon this concept, that is Hollidge v Bank of New Zealand, does not present anything like a contribution to the systematisation of the concept.

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58. [1982] 1 Q.B. 133 page 156.

59. As per Lord Eldon in Dann v Spurrier (1802) 7 Ves. Jun. 231 at page 236; cited with approval by Oliver J. in Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] 1 Q.B. 133 at page 156.

The following propositions would appear to follow from the decided cases. Detrimental reliance, in some form or other, would appear to be an essential prerequisite of all heads of estoppel including the Ramsden v Dyson principle. The courts will require that the res guestae giving rise to the detriment is the result of the representee relying upon the representation of the representor. There must be a proximate cause between the conduct of the two parties. This again would appear to be a requirement of every head of estoppel but, as yet, the courts have not endowed this notion with any high degree of sophistication. The cases clearly indicate conflict in regard to the nature of the detriment required and in particular as to whether or not it is relevant that the situation is reversible.

Detrimental reliance is an aspect of estoppel which clearly illustrates that estoppel can operate in favour of parties who fail to secure their expectations with a rigid compliance with conveyancing requirements. This could be because, like Miss Cooke, they are bereft of professional advice or negotiating skill, or they are carried along by the exigencies of the moment and are prepared to rely, in blissful faith, upon the word of the representor.

On the other hand it would appear that this aspect of the estoppel could infuse a very substantial element of fortuitousness into its application. A representee may, in good faith, act upon the representation and whether or not those acts amounted to sufficient detriment would be largely at the discretion of the court. On the other hand, once the concept of detrimental reliance became reasonably systematised, it would be possible for a representee, with astute legal advice, to deliberately place himself in a position which he knew would be treated by the courts as sufficient detriment, thus securing his title as against the representor. It is even possible to envisage conveyancing techniques evolving which would have the effect of securing the enforceability of the representation, thus serving to create something in the nature of a

contract out of what was initially nothing more than a gratuitous promise. While such practices would never be condoned by a court of equity evidential problems may face a representor who tried to prove this in a modern court. At the same time the representee who either through indolence, ignorance, lack of legal advice, or whatever, fails to secure the requisite detriment could well be left without a remedy, at least in estoppel.

The decisions handed down so far do not leave us with any very clear distinction between the mere acting upon a promise and detriment as a result of acting. As indicated above what actually amounts to detriment as against the mere acting upon a representation, is very subjective to the opinion of the court. This serves to infuse a substantive element of morality into the application of the estoppel and one could challenge the propriety of such a situation.

In view of the relative absence of established rules in many areas of estoppel it is not difficult to conceive of a point being reached where detrimental reliance assumes the status of providing a basis for the application of estoppel. This is especially so if estoppel is regarded as 'a principle of justice and of equity'. The 'justice and equity' will rest essentially in the detriment which the representee has suffered. If the rules pertaining to the required detrimental reliance are not prescribed by the courts its application must essentially rest upon the subjective judgment of the individual court. This being so it is inevitable that judgments of morality and social value must assume a substantial role in the administration of the estoppel.

The courts do not appear to have concerned themselves with balancing the detriment of one party against the possible detriment to the other. If justice and equity is to form the basis for the application of the principle it is reasonable to assume that the courts would deny relief under the estoppel in those instances where to do so would cause detriment to the representor which was out of proportion of that which would be caused to the representee by not allowing the estoppel.

Conclusion. Detriment an Independant Requirement or Merely an Aspect of a Wider Requirement of Unconscionability?

Reverting now to the question posed at the commencement of this chapter; is the requirement of detriment merely an aspect of a wider concept of unconscionability which is necessary before the Ramsden v Dyson principle can be invoked, or must the representee establish both detriment and unconscionability? On the other hand is the true test unconscionability rather than detriment?

As has been indicated it is possible to ascertain detriment in virtually every instance where the Ramsden v Dyson principle, and indeed estoppel in its wider aspects, has been successfully invoked. Until this detriment can be seen as encumbered with specific rules of its own it appears best viewed as but an aspect of the wider unconscionability. That is the representee must show that he has or will suffer detriment should the representor be permitted to resile from the expectation which he has raised. Without the detriment there can be no equity in favour of the representee and thus no jurisdiction to intervene. Once having established detriment the court will then make an assessment of the overall situation as to unconscionability, taking into account the detriment of the representee.

This approach which regards the detriment as but one aspect of the wider unconscionability appears to be confirmed by Robert Goff J. in Societe Italo - Belge pour le Commerce et I'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd "The Post Chaser" [60.] when he adopted the test laid down by Lord Cairns L.C. in Hughes v Metropolitan Railway Co [61.] to the effect that the representor will not be allowed to enforce his rights 'where it would be inequitable having regard to the dealings

60. [1982] 1 All ER 19

61. (1877) 2 App Cas 439, [1874-80] All E.R. Rep 187.

which have taken place between the parties' [62].

It must be admitted that Hardie Boys J. in Hollidge v Bank of New Zealand appears to have taken a much more precise view of detriment than his English counterparts. But even in that decision the detriment could be construed as part of a wider assessment of unconscionability. What Hardie-Boys J. appeared to be saying is that even although there may be detriment it would not be unconscionable for the money to be repaid.

The overall assessment of the contemporary law upon this point is that it is still in such a diffused and unsystematised state as to give the courts an almost unlimited discretion as to how they apply it.

Some of the dicta upon detriment can with respect be described as unfortunate. The view, for example, that mere acting upon the expectation is adequate is clearly not appropriate to the Ramsden v Dyson principle even if, and this seems doubtful, it is appropriate in cases where the estoppel is founded upon an express representation. Clearly more is required than merely acting on the expectation.

It appears certain that resting satisfied in the status quo, as a result of the expectation, will be sufficient, if as a result of the representor resiling from that expectation the representee stands to suffer detriment. That is a loss or potential loss resulting from abstaining from acting can be a sufficient detriment providing that abstaining is a direct result of the expectation. Thus it is submitted that to talk of 'change of position' or 'change of circumstances' can be misleading. [63]. The wider expression 'detriment' far more accurately describes the requirement. To talk of a change of position could be accurate if what is referred to is not so much the change of position resulting from the representee relying upon the expectation but rather the change of

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62. (1877) 2 App. Cas. 439 at page 448, (1874-80) All ER Rep 187 at page 191.

63. C.f. Jones G.H. 'Change of Circumstance in Quasi-Contract' (1957) 73 L.Q.R. 49.

circumstance which would flow from the representor deserting the expectation which he has raised.

The statement of Dixon J. in the High Court of Australia in Grundt v Great Boulder Pty. Gold Mines Ltd. [64] has stood the test of time;

> 'In stating this essential condition, ... it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct ... it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former party acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain' [65].

It is noted that the concept of 'change of circumstance' is not limited to estoppel but is also to be found as a defence in the English law of restitution. [66] If there is any development of estoppel along with development of detriment within the area of restitution there could be a tendency for the concept of detriment as developed in this other area to be translated and applied in Ramsden v Dyson cases.

However the view has been expressed that '... the quantum of detriment necessary to establish an estoppel is less than that necessary to establish

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64. (1938) 59. C.L.R. 641.

65. Ibid at page 674.

66. See also sections 94A, 94B Judicature Act 1908 for the New Zealand Law. See also section 142 of the U.S. Restatement of Restitution.

the defence of change in circumstances, (in restituion). In the estoppel cases the English courts have been concerned more with the element of representation than with detriment. Any detriment will do; and in the recent quasi-estoppel line of cases it is difficult to discover any detriment suffered by the representee [67].

This could provide an explanation of the apparently, extraordinarily high standard of detriment required of the representee in Hollidge v Bank of New Zealand where although the issue was determined basically upon estoppel the Court there applied the quantum of detriment established as applying to restitution cases. [68].

A more precise differentiation of the quantum and nature of detriment as between estoppel and restitution cases will probably be an issue which future courts will be required to address. As the law stands at present it would appear that so far as estoppel is concerned a representee who attempts to found his detriment upon money wrongfully received, and subsequently paid over, is in a much worse position than a representee who can fall back upon other forms of detriment. This would appear to be especially so in respect to the attitude of the New Zealand courts.

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67. Jones G.H. op. cit. at page 56.

68. The Court in Hollidge v Bank of New Zealand clearly recognised a general distinction between estoppel and section 94B of the Judicature Act. But this raises a much wider question of the availability of both section 94B and estoppel as defences to an action in restitution under current New Zealand law.

Chapter Nine

REMEDIES: PROPRIETARY RIGHTS DERIVING FROM THE RAMSDEN V DYSON PRINCIPLE

Introduction: Remedy Not Limited But at Discretion of Court

Recent decisions have thrown considerable light upon the nature of the remedies and rights which can be obtained from a successful reliance upon the Ramsden v Dyson principle. The overall general effect of these decisions is to show that the rights which can derive from the principle are virtually unlimited. It does not appear possible to clearly systematise the nature or parameters of the remedies which can flow from the estoppel. A few points are, however, clear.

The principle can give rise to the established equitable and common law remedies such as injunction and damages. Unlike part performance in the law of contract the relief is not confined to any specific remedy. No remedy like the specific performance of the expectation which was raised by the representor has been evolved. Any remedy therefore is not limited to simply making good the expectation which was raised by the representor. Instead the courts will, it appears, in each case determine how best the equity may be satisfied. How they do so is apparently completely at their discretion. This raises the issue of whether or not there is any specific proprietary right which derives from the principle. The decisions would appear to indicate that rather than according satisfaction to any specific proprietary right the remedies awarded have been tailored to fit the wrong suffered by the representee. The remedies which have been provided are thus of a highly idiosyncratic nature.

It should be emphasised that the Ramsden v Dyson principle is not limited to the creation of a proprietary right in the property of another. In many instances the representee will not be seeking the creation of a proprietary right in his favour but will be desiring merely to use the principle as a defence against an action by another. However it is in its ability to create a proprietary right that we see the Ramsden v Dyson principle at its most aggressive. It is in this respect that a clear distinction between the Ramsden v Dyson principle and other heads of estoppel becomes obvious.

The Proprietary Rights Deriving from the Principle Arise From An Assessment of the Nature and Extent of the Equity.

The decision of the Court of Appeal in Pascoe v Turner confirmed also that as well as 'taking into account all relevant circumstances' in determining the remedy available to the representee, the courts will also consider all relevant circumstances in determining the nature and extent of the equity. It is this which gives rise to the proprietary right which the representee has in the property.

Pascoe v Turner indicated that there is virtually no limit to the extent to which the courts can range in order to assess the nature of the equity and its consequent proprietary right. These circumstances can be quite unrelated to the conduct of the representor but pertain to the personal conditions of the representee. In Pascoe v Turner it will be recalled, the male party to a defacto relationship was attempting to oust the woman from a house property he had promised her.

In Pascoe v Turner three possibilities by way of proprietary interest presented themselves. Firstly there could be a beneficial interest deriving from the 'constructive' trust arising from the 'words and

conduct of the parties'[1]. Secondly, the representee could be granted a licence to occupy the property for life, that is a life interest in the property. As at the date of the hearing the representee had merely a licence revocable at will. The third alternative available to the court was to actually perfect the gift, that was grant specific performance of the expectation raised, and order the transfer of the fee simple.

The court in assessing the circumstances of the case placed considerable emphasis upon the physical circumstances of the representee. It recognised that the representee was 'a widow in her mid fifties'[2]. that 'during the period she lived with the plaintiff her capital was reduced from....' 'save for her invalidity pension that was all that she had in the world' and most significantly, focusing upon the conduct of the representor, 'The history of the conduct of the plaintiff .... in relation to these proceedings leads to an irresistible inference that he is determined to pursue his purpose of evicting her from the house by any legal means at his disposal with a ruthless disregard of the obligations binding on conscience. The court must grant a remedy effective to protect her against the future manifestations of his ruthlessness'[3]. The court then went on to consider that if she were granted a licence then she could find herself ousted by a purchaser for value without notice. Also if she was to go on and do

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1. This was the remedy found by the High Court but the Court of Appeal held that there was nothing in the facts from which a constructive trust could be inferred.
2. As per Cumming-Bruce L.J. (1979) 2 All E.R. 945 at page 951
3. (1979) 2 All E.R. at page 951

further repairs to the property she may have to charge it and this would not be possible if the interest which she had was merely a licence. In the circumstances the court found that the equity could only be effectively satisfied by the representor transferring the fee simple to the representee thus making her the registered title holder.[4] The nature of the equity was thus that of registered proprietor.

This decision indicates the highly specific nature of the particular equity and the various circumstances which contribute to that equity. The conduct of both the parties was considered to be relevant as well as their individual circumstances. The court was intent in protecting not only the immediate interest of the representee in the property but also in securing her future interest in the property.

No Specific Proprietary Right Derives from The Ramsden v Dyson Principle

If the equity founding the estoppel is specific to the parties then it follows that the proprietary right deriving from the equity is also peculiar to the parties. The proprietary right is therefore, like the remedy, idiosyncratic and not possessed of any predeterminable form. The nature of the particular proprietary right is ascertained at the discretion of the court in each individual instance.

This, however, poses problems. One problem is the point of time at which the proprietary right arises. Does the right arise at the time the actual equity arises or does it arise only when it is specified by the Court? This could raise difficulties in respect to the

4. In doing so Cumming-Bruce L.J. cited with approval the decision of the New Zealand High Court in Thomas v Thomas [1956] N.Z.L.R. 785, where the defendant representee was ordered to execute a proper transfer of the house property after orally abandoning it to his wife.

interests of third parties. A proprietary right deriving from the equity could be defeated by a bona fide purchaser without notice of the equitable interest, but what degree or quantity of notice would be required of the third party before the proprietary right deriving from the equity would be protected against the third party. If the right is not specified or quantified by the court this could be a difficult situation. If one takes Pascoe v Turneras an example, the representor could have sold the property with the representee in possession ostensibly as a tenant and with the third party unaware of the proprietary interest of the representee. Unless the third party was aware of the representation made to the representee by the representor he would obtain a clear title to the property. The equity could presumably not be enforced against him. The representee would then no doubt be left with an action against the representor and the court would then probably be required to quantify the proprietary right and award the appropriate compensation. But a further problem could be the question of whether the representor who had disposed of the property would be liable for any further equity which may have arisen following his disposal of the property to the third party. In some instances it is possible that the detrimental reliance could have taken place following the disposal of the property.

Proprietary rights arising from the estoppel are transmissible.[5] In the present circumstances, with the nature of the right so highly dependant upon the discretion of the court, it would appear probable that in many instances the parties would have to resort to litigation in order that they could ascertain precisely what was available to transmit. The uncertainty of the situation is illustrated by the facts in Pascoe v Turner. Assume for example that both of the parties were

5. See E.R. Ives Investments Ltd v High [1967] 2 Q.B. 379.

agreed there that the representee did have a interest for life and she had sought to assign that interest and this assignment was agreed to by the representor. Would the assignee there be obtaining not a life interest but the fee simple unbeknown to all the parties including himself?

It does appear obvious from Pascoe v Turner that neither of the parties was aware of their exact proprietary rights in the property. Indeed the representee would have been prepared, it appears, to have settled for less than she obtained and the representor defeated his own purposes by taking the litigation to appeal.

The vital question therefore remains whether or not the proprietary rights deriving from the estoppel actually exist only after having been specified and quantified by the courts. The proprietary right can be something quite beyond the contemplation of the parties.

The Principle Can Revest a Registered Title Under the Land Transfer System

Recent decisions would appear to make it clear that the estoppel can deprive a party of title to property even to the extent of revesting the fee simple in the representee.

The estoppel goes back in history to a point of time considerably earlier than that of the Torrens system of land registration, now contained in the Land Transfer Act 1952 and the definitive relationship as between estoppel based rights and those of the registered proprietor, no doubt, has yet to be formulated by the courts. However there can be no doubt that as between the immediate parties to the estoppel the fact of registration will not serve to defeat a right arising from the estoppel.

There has possibly been a slight hesitation in arriving at this position especially by the New Zealand courts. One feels, for example, that in McBean v Howey[6]. where the representee was seeking an injunction to protect a right of way over the property of his neighbour which, he claimed, was based upon estoppel, the major obstacle in the way of the representee was the registered title in favour of the representor.

In the later decision in Webb v Blenheim Borough Council[7]. there is explicit reference to the problem of the capacity of estoppel to overcome a registered title. There, it will be recalled, the council sought to call the estoppel into aid as a defence to an action in trespass. In that case Beattie J. said, 'Apart from the difficulty of being faced with a guaranteed land transfer title'[8].

However any inhibitions which might have existed as to the ability of the principle to revest a registered title can now be regarded as well and truely spent.

The New Zealand High Court decision in Thomas v Thomas[9]. appears to have established a precedent in this area and was one of the very few decisions relied upon, indeed the only one on this point, by the English Court of Appeal in Pascoe v Turner. In both those decisions the court ordered the representor to execute a transfer of the fee simple to the representee. Pascoe v Turner sets out the grounds upon which the court will order the revesting of the fee simple, that is, that it is the most effective way in which the equity can be satisfied. Provided the satisfaction of the equity requires the transfer of the fee simple the fact of a registered title will provide no barrier.

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6. [1958] N.Z.L.R. 25
7. [1975] 1 N.Z.L.R. 57
8. Ibid at page 62
9. [1956] N.Z.L.R. 785

Proprietary Rights Less Than That of Registered Proprietor

Proprietary rights arising from the estoppel can give rise to statutory remedies where these are appropriate. In Plimmer & Another v Wellington City Corporation[10]. the considerable flexibility of the principle in creating proprietary rights was illustrated. In 1848 Plimmer had taken possession of part of the foreshore of Wellington Harbour and erected a jetty thereon with the consent of the Provincial Government. Later he reclaimed land and, at the suggestion of the Provincial Government, erected thereon a warehouse for the accommodation of immigrants, for which it was used until 1882, when the possession of the land was resumed by the City Corporation. The assignees of Plimmer claimed compensation under section 4 of the Public Works Act 1882, which enabled any person 'having any estate or interest in or out of the lands by the said Act vested in the Corporation' to make a claim for compensation and provided that in determining the title of any claimant the Court shall not 'be bound to regard strict legal rights only but may award compensation in respect of any claim which the Compensation Court may consider reasonable and just having regard to the circumstances'.

The right deriving from the principle in this instance was a licence. Their Lordships found no difficulty in bringing this licence under the appropriate provisions of the Public Works Act. The licence had, when first granted, been revocable at will, but the subsequent

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10. (1883) 9 App.Cas. 699, N.Z.P.C.C. 250.
This Privy Council decision was cited with approval in Pascoe v Turner (1979) 2 All E.R. 945 at page 949; Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] 1 Q.B. 133 at page 148; Crabb v Arun District Council [1976] 1 Ch. 179 at page 188; E.R. Ives Investments Ltd v High [1967] 2 Q.B. 379 at page 400.

conduct of the City Corporation had been sufficient, by virtue of the operation of the principle to turn this licence revocable at will, into a perpetual right to a licence. According to their Lordships that conduct had been 'sufficient to create in his (Plimmer's) mind a reasonable expectation that his occupation would not be disturbed'[11].

This decision in Plimmer v Wellington City now provides a very sound precedent upon which to build rights deriving from the estoppel. It was applied in Hauhungaroa 2 C Block v Attorney General[12]. where the Crown was permitted, on the basis of the estoppel, to continue with a licence over Maori land to obtain access to a power plant when the Maori owners had stood by while the Crown constructed a road over the land.

The right to an equitable charge or lien was demonstrated in re Whitehead[13]. where a son had expended money in the erection of a cottage on land owned by his father in the apparent expectation of the transfer of the title to him at some time in the future. The action failed in the High Court upon the evidential ground that there was no promise to transfer the fee simple nor that the son had, by his conduct, established any equitable claim. But on appeal an equitable lien was granted in reversal of the decision of the High Court where it appears to have been assumed that nothing short of the acquisition of the transferable title would have satisfied the claim of the appellant. The Court of Appeal was emphatic that such was not the case. The amount of the lien was assessed at £400 in accordance with the actual expenditure which had been incurred by the appellant in the improvements to the land

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11. N.Z.P.C.C. page 260
12. [1973] 1 N.Z.L.R. 389
13. [1948] N.Z.L.R. 1066

in dispute.[14].

It now appears that the right to a lien can derive from a successful plea of the principle. This is an extremely flexible right. As indicated in re Whitehead it could attach to property to give the representee an interest less than that of registered proprietor and as such could be claimed in instances where the representee was unable to prove an actual expectation in respect to the fee simple of the property but could prove an expectation in respect to some lesser interest. It could also be useful in cases where the representee desired to recover his expenditure on the property but was not interested in residing in it. The lien provides the necessary security for this.

The courts do not appear, in granting relief, to be overtly inhibited by any difficulty in quantifying the nature and extent of the interest of the representee. In re Whitehead the lien was readily quantifiable; the amount of the interest could be assessed. The question also arises of what interests could be represented in the form of an equitable lien. It could be used as security for compensation which may be awarded and as such could probably be used to secure any proprietary right which derived through the Ramsden v Dyson principle.

The equitable lien is thus an extremely useful weapon. It could be used to strip a representor of any improvements which the representee had made to the property. It may, for example, have been an appropriate

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14. Authority for this course of action was found in Hamilton v Geraghty (1901) 1 N.S.W. S.R. (Eq) 81.
'... either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a Court of Equity would give relief' ibid at page 89.

solution to Pascoe v Turner. It does appear remarkable that the lien has not been more frequently used by the courts in the present resurgence of the principle. It would appear to be a remedy which afforded a greater degree of justice that the actual transfer of the fee simple in that it could restore the parties to their previous position.

The Remedy is Not Limited to a Making Good of the Expectation Raised But Will at the Court's Discretion be Tailored to Fit the Wrong in Each Individual Case.

Although the basis of the Ramsden v Dyson principle is the creation of an expectation deriving from a representation, the remedy provided is not limited to a making good of that specific expectation. The process of the remedy available in the case of the principle thus differs significantly from that provided in the case of the part performance of the contract which was found to be unenforceable for non compliance with the Statute of Frauds. Relief was permitted there by equity and the equitable remedy of specific performance was the only remedy evolved. Also in the case of High Trees estoppel, where estoppel acted as a defence, the effect of a successful plea is also essentially in one direction and that is simply to prevent the representee from resiling from his promise. It is clear that no such limits are placed upon the remedy which can derive from the Ramsden v Dyson principle. There is thus not necessarily any specific performance of the particular expectation raised. Rather the courts have assumed a discretion, which they will exercise in each individual instance, as to how best to make good the equity:

> 'The equity having thus been raised ...., it is for the courts of equity to decide in what way that equity should

be satisfied'.[15.]

It would appear that the remedy does not thus need to be that specifically sought by the representee. Indeed the uncertainty of the actual remedies which are available would tend to accentuate this point. In many cases the representee may not be aware of what remedy there is available to him. The remedy could go much further than that initially sought by the representee.[16.]

In seeking the 'minimum equity to do justice to the plaintiff'[17.] the rules upon which the courts will operate have had more light thrown upon them by recent decisions. Thus 'there can be no doubt that since Ramsden v Dyson the courts have acted on the basis that they have to determine not only the extent of the equity, but also the conditions necessary to satisfy it, and they have done so in a great number and variety of cases'.[18.] This would clearly indicate that the courts are not prepared to encumber themselves with rigid general rules but will consider each case upon its own merits; 'so the principle to be applied is that the court should consider all the circumstances'[19.] The question therefore arises as to whether there is any limit to the remedy.[20.]

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15. As per Lord Denning M.R. in Greasley v Cooke [1980] 3 All E.R. 710 at page 713.

16. See the decisions referred to infra.

17. As per Scarman L.J. in Crabb v Arun District Council [1976] 1 Ch. 179 at page 198 cited with approval by Cumming Bruce L.J. in Pascoe v Turner [1979] 2 All E.R. 945 at page 950

18. ibid.

19. ibid.

20. The flexibility of the remedy available was confirmed in Plimmer v Mayor of Wellington (1884) 9 App. Cas. 699, which was cited with approval on this point in Hauhungaroa 2 C Block v Attorney General [1973] 1 N.Z.L.R. 389.

The extent to which the courts are prepared to go in order to satisfy the equity was aptly shown in the decision of the Court of Appeal in Pascoe v Turner, where the representee was seeking to rely upon the estoppel, the Dillwyn v Llewelyn principle that is, to resist an action for possession of a house property which she claimed had been promised to her by way of gift. Council for the defendant representee sought a declaration that the representor held the reality upon trust or that he had given the representee a licence to occupy and that he was estopped from denying the trust or the licence. Significantly however, the court in that instance decreed specific performance of the expectation which had been raised by the representation and held that 'the equity to which the facts in this case give rise can only be satisfied by compelling the plaintiff to give effect to his promise and her expectations'[21]. and that there 'be a declaration that the estate in fee simple in the property .... is vested in the defendant'[22].

Confusion as to the nature of the possible remedy is also evident in the earlier New Zealand case of re Whitehead[23]. as between the decision of the High Court and that of the Court of Appeal. There a son had expended money in the erection of a cottage on land owned by his father in the apparent expectation of a transfer of the title to him at some time in the future. Christie J. in the High Court held, inter alia, that the son had failed to establish any equitable claim in the property. But on appeal, where the son claimed, in the alternative (a) a declaration of title to the property or (b) the value of the asset which he had created, the court granted an equitable lien over the property.

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21. [1979] 2 All E.R. 945 at page 951
22. ibid
23. [1948] N.Z.L.R. 1066

It is possible that the decision in the later case of Pascoe v Turner may have resolved what the court perceived as a problem in the earlier instance. The court in re Whitehead appears to have been intent upon matching an equitable remedy with the right deriving from equity. In Pascoe v Turner the right deriving from equity, that is the Dillwyn v Llewelyn principle, was clearly seen as not limited to an equitable remedy. The representee obtained an order vesting in her the estate in fee simple, which is, of course, statutory. It would appear therefore that it is irrelevant to the remedy whether the relevant estoppel is of equitable or common law in origin.

So, having ascertained that there is 'an equity established' and 'the extent of the equity, if one is established' that is, for example whether or not it is possessory in nature, the court will then go on to consider 'what is the relief appropriate to satisfy the equity'[24]. Although this approach may be fully in accord with the traditional application of the equitable jurisdiction it certainly is not free from difficulty. The courts appear to be assuming to themselves a virtually unlimited discretion in seeking the remedy which they believe best fitted to satisfy the equity. The result is that no certain remedy flows from the estoppel; the remedy is quite idiosyncratic and special in character. This has, it appears, on occasions confused both courts and litigants. The remedy can amount to the specific performance of the actual expectation which has been raised in the mind of the representee but it is clearly not limited

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24. As per Roskill L.J. in Jones (A.E.) v Jones (F.W.) [1977] 2 All E.R. 231 at page 236 citing with approval from Scarman L.J. in Crabb v Arun District Council [1976] Ch 179 at page 193.

to that. Equally it is clear that the remedy need not be equitable in nature despite that the original proprietary right may have existed only in equity.

Injunction and Damages

The estoppel can give rise to the remedy of injunction. This has been confirmed by the decision of the Court of Appeal in Crabb v Arun District Council where the injunction was issued by the Court to prevent the District Council from interfering with an access way which derived from a successful pleading of the estoppel. The right of access way which the estoppel confirmed as existing in the plaintiff representee derived from acquiescence by the representor and was thus equitable in nature. The Court perceived no theoretical objection in issuing an injunction to secure such a right and in doing so was applying established authority in the form of the decision of the Court of Appeal in E.R. Ives Investments Ltd. v High[25]. where the injunction was also issued to prevent successors in title to the representor from interfering with a right of way which had, arisen through acquiescence. The injunction was issued in these instances to protect equitable rights which derived from the estoppel[26]. There would appear to be little need to conjecture as to whether or not an injunction would be available to protect rights which arose from other forms of representation, for example a specific promise. There would appear to be no objection to the issuing of an injunction to protect any rights deriving from an estoppel arising from any form of representation.

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25. [1967] 2 Q.B. 379

26. See also the earlier New Zealand case of Burns v Dilworth Trust Board [1925] N.Z.L.R. 488, where an injunction was issued to restrain the representor from departing from a plan of subdivision upon which the lease of the representee had been granted.

Presumably, however, the issuing of an injunction would be subject to the normal rules which pertain to such a remedy and being equitable in nature it could be defeated by the subsequent conduct of the representee.

Having established that the injunction can issue to protect rights deriving from the estoppel if follows that damages would be available in appropriate cases by substitution under The Chancery Amendment Act 1858, Lord Cairn's Act.[27]. But an award of compensation or restitution would also be possible. Again it is a moot point whether this would be limited to those instances where the estoppel was specifically of equitable origin. Compensation and restitution are, of course, equitable remedies. The right to compensation for a successful plea of the estoppel was early established in Plimmer v Mayor of Wellington[28]. and was confirmed by the New Zealand Courts in Hauhungaroa 2 C Block v Attorney General[29]. where the Maori owners of land had stood by while the Ministry of Works constructed a road over their land. Moreover it has been confirmed that compensation may be awarded, as for example, for money spent in reliance upon the expectation even when the expectation itself is not fulfilled.[29a].

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27. This substitution of remedies was considered in the Court of Appeal in Shaw v Applegate (1978) 1 All E.R. 123 where the estoppel was unsuccessfully pleaded to attempt to prevent the enforcement of the terms of a restrictive covenant affecting land.

28. (1884) 9 App. Cas. 699 This was confirmed by way of dicta in the High Court in Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd. [1982] 1 Q.B. 133 at page 148.

29. [1973] 1 N.Z.L.R. 389 The Court there considered the best way to satisfy the equity and concluded that this could be achieved best by the continuing of the license rather than the granting of compensation.

29a. As in Dodsworth v Dodsworth (1973) 228 E.G. 1115.

Conclusion - The Flexibility of Rights and Remedies Deriving from the Estoppel

It is now obvious that the rights and remedies deriving from the estoppel are highly idiosyncratic in nature. They will be tailored by the court to fit the circumstances of the successful representee in each individual case. Pascoe v Turner demonstrated the lengths to which the courts are now prepared to go in order to best satisfy the equity which has been raised in favour of the representee. Factors which are highly personal and subjective to the domestic circumstances of the representee and which have nothing at all to do with the conduct of the representor, can be considered relevant and taken into account by the court in assessing the extent of the proprietary right in favour of the representee.

It is clear that '.... the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated'[30]. The interest can be something which was entirely beyond the contemplation of the parties. The interest need not amount to a mere making good of the expectation raised by the representation of the representor; it is not limited to the specific performance of the expectation. The conclusion is that no specific proprietary right is protected by the estoppel but once the equity as deriving from the estoppel is demonstrated to exist in favour of the representee the courts will formulate the proprietary right in each individual case so as to best satisfy that equity. This can raise questions, not yet settled, as to the existence of the right prior to

30. As per White J. in Denny v Jensen [1977] 1 N.Z.L.R. 635 at page 638, citing with approval from Plimmer v Mayor of Wellington (1884) 9 App Cas 699 at page 713.

its formulation by the court. It is not clear at what time it actually comes into existence.

Once effectively formulated by the court the proprietary right is completely concrete and real and can take its place alongside rights obtaining from a formal conveyance as by means of a contract. The proprietary right deriving from the estoppel is not, as has been said, 'a mere negative title'[31]. and 'except in that sense, no title whatsoever is established by the estoppel'[32].

Similar arguments are applicable to the remedy which flows from a successful plea of estoppel. The remedy could well be something which, it seems, was not within the contemplation of the parties. Once the court, has established the equity, and formulated the appropriate proprietary right, it will decree whatever remedy it regards, in its discretion as best fitted to attaining that right. Thus like the right itself the remedy can be idiosyncratic and specific to the indiviudal case.

In granting a remedy the courts have not shown any inclination to restoring the parties to the state in which they were prior to the estoppel. Restitutio in integrum is clearly not relevant in the issuing of a remedy. Rather the courts will tend to secure the future of the representee. Also mutuality does not appear to be much within the minds of the judges. Emphasis has been not so much upon justice to both parties but upon securing the rights of the representee.

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31. Spencer-Bower G. and Sir Alexander Turner 'The Law Relating to Estoppel by Representation' 3rd ed. London, Butterworths, 1977, paragraph 13 page 17.

32. ibid; the editor Sir Alexander Turner subsequently points out that these were the words of Spencer-Bower in the first edition and that they now require modification in the light of subsequent developments in the law.

The flexibility and discretionary nature of the available remedies was aptly illustrated by Dodsworth v Dodsworth [33]. where the Court deemed it appropriate not to protect the expectation but nonetheless awarded compensation in respect to expenditure incurred in reliance upon the expectation. Thus although the Court was not there prepared to find any proprietary right it was still able to award compensation.

In conclusion a few words in respect to the possible destruction of the equity, and consequent destruction of the rights deriving therefrom, by the later conduct of the representee.

This point was directly in issue in Williams v Staite [34] where an equitable licence to occupy land for life had been granted to an elderly couple. The tenants later attempted to obstruct a subsequent purchaser of the fee simple in his enjoyment of the property and an adjoining property which he had also purchased. This was done by resorting to generally obstructive and abusive tactics.

The new owner thus commenced an action in ejectment. The point in issue was whether the conduct of the tenants, after having established their equitable right to a license, was such as to now destroy the equity which had been found earlier in their favour.

The action in ejectment had suceeded in the County Court but failed on appeal.

Lord Denning M.R. maintained that the equity could possibly be revoked in an extreme case. Goff L.J. was more adamant that once the equity is established it cannot be defeated:

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33. (1973) 228 E.G. 1115.

34. [1979] 1 Ch. 291.

'Excessive user or bad behaviour towards the legal owner cannot bring the equity to an end or forfeit it. It may give rise to an action for damages or trespass or to injunctions to restrain such behaviour, but I see no ground on which the equity once established can be forfeited. Of course, the court might have held and might hold in any proper case, that the equity is in its nature for a limited period only or determinable apon a condition certain' [35].

On the other hand Cumming Bruce L.J. leaves the matter more open:

'I do not think that in a proper case the rights in equity of the defendants necessarily crystallise forever at the time when the equitable rights come into existence' [36].

It was recognised in Williams v Staite that this issue was novel.

Although the finding of the Court of Appeal can hardly be described as unanimous, it tends to the view that once the expectation has been raised and the equity crystallised it will require extreme conduct on the part of the representee to defeat his own equity. Can, indeed, it be destroyed at all?

To apply this argument to a topical example: if a parent should promise a child a house property on the condition that the child come and live in the house and there care for the parent during his lifetime, a subsequent conflict between the parent and child would probably not defeat the equity in favour of the child. [37]. Provided the child had suffered the necessary detriment in living with the parent the equity would probably be secured even if the row had been caused by the child.

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35. Ibid at page 300.

36. Ibid

37. c.f. Burridge S.J. 'A Metric Measurement of the Chancellor's Foot' [1982] 41 C.L.J. 290.

Thus if the parent attempted to sell the property to spite the child the latter could probably successfully invoke the Ramsden v Dyson principle [38].

The facts of Williams v Staite also served to illustrate the subsequent problems which can arise between parties especially when a proprietary right less than that of the fee simple has been decreed. Are there overtones here of the traditional recognition of the limitation of the remedy of specific performance by the courts of equity especially in regard to contracts of personal service. To take the reverse of the situation in Williams v Staite, one could well imagine attempts being made to defeat proprietary rights granted upon the basis of the Ramsden v Dyson principle by the holders of competing rights. The holder of the fee simple, for example, could make the life of an equitable licensee very difficult. An attempt to resolve this problem was clearly made in Pascoe v Turner but it is a problem which, could have to be faced in the future.

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38. c.f. Dodsworth v Dodsworth (supra) Griffiths v Williams (1977) 248 E.G. 947.

Chapter Ten

THE RAMSDEN V DYSON PRINCIPLE AS THE BASIS FOR AN EDIFICE OF ESTOPPEL

Introduction: The Consequences of a Rejection of 'Strict Categorisation'

Bearing in mind the rejection of a strict categorisation of estoppel by both Oliver J. (as he then was) in the High Court in Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd[1]. and by Robert Goff J. in Amalgamated Investment & Property Co Ltd (in liquidation v Texas Commerce International Bank Ltd.[2]. the question which then presents itself for resolution is the role, if any, which the Ramsden v Dyson principle plays as providing a foundation stone for other heads of law including other heads os estoppel.

It is now possible to see the Ramsden v Dyson principle as providing a theoretical base, at least, for an edifice of various heads of law which have hitherto been generally regarded as having little in common with the principle.

This process of the osmosis of the Ramsden v Dyson principle into other areas of law has been assisted in some cases by the absence of coherent development of the law in these other areas. In some cases the assumption of the Ramsden v Dyson principle to these other heads of law has been a conscious act on the part of the courts, while in others it has been very much implicit.

Three areas, in particular, immediately present themselves as possible targets for encroachment by the Ramsden v Dyson principle. Two of these, that is common law estoppel by representation, and the

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1. [1982] 1 Q.B. 133 at page 147.

2. [1982] 1 Q.B. 84 at page 104.

equity to perfect a gift, that is the principle laid down in Dillwyn v Llewelyn,[3]. have traditionally been regarded as aspects of estoppel, while the other, that is non contractual waiver, has been seen judicially, as both distinct from estoppel[4]. and akin to estoppel.

The Possible Subsumption of Common Law Estoppel by Representation or Conduct by the Ramsden v Dyson Principle.

A substantial body of law relating to estoppel by representation, or conduct, has envolved in the common law and it is now possible to see this as being affected by recent developments in the Ramsden v Dyson principle. This could be assisted by the fact that this common law estoppel is not only devoid of precedents which, in effectiveness, match that of Ramsden v Dyson but is beset with a number of obvious difficulties to the representee.

If the starting point to an action under the Ramsden v Dyson principle is accepted as the raising of an expectation, by the representor, then a specific representation will, equally with conduct, suffice to do this. But the common law has long allowed specific representations, and also conduct, as founding an estoppel.

An examination of older decisions based ostensibly upon common law estoppel, reveals that, in the light of recent developments in the Ramsden v Dyson principle, some of them, at least, could now be

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3. (1862) 4 De G F & J 517; 45 ER 1285.

4. 'When its true foundations are stated, it will be seen that estoppel is separated from waiver in point of principle by a very board line of demarcation' as per Isaacs J. in Craine v Colonial Mutual Fire Insurance Co Ltd (1920) 28 CLR 305 at page 327.

   'Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel' as per Denning L.J. (as he then was) in Rickards (Charles), Ltd v Oppenhiam (1950) 1 KB 616, at page 623; (1950) 1 All ER 420 at page 423.

seen as coming within that principle.[5]

As estoppel by representation was beset with many difficulties, especially as regards the establishment of the necessary representation,[6] the creation of the required expectation to establish the Ramsden v Dyson principle would appear, in many instances, to present the representee with less problems than setting up the representation necessary to found a common law estoppel by representation. The common law appears to have concentrated, to a large extent, upon the nature and form of the actual representation, rather than upon its overall effect, as now appears to be the test applicable to the expectation required under the Ramsden v Dyson principle.

This movement of the principle into the area of common law estoppel could probably be assisted by the fact that in regard to the establishment of the required detriment there would now appear to be no very

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5. For example in Yorkshire Insurance Co Ltd v Craine [1922] 2 AC 541, the Privy Council applied what was referred to as 'estoppel by conduct' to prevent an insurance company which had taken possession of the insured premises, following a fire, and remained in possession for some four months from then falling back upon a clause in the policy to evade liability. The estoppel was there applied without reference to precedent. It would appear than the conduct of the Insurance Company was quite sufficient to raise the necessary expectation to support the Ramsden v Dyson principle.

   Also in Rodenhurst Estates Ltd. v Barnes Ltd [1936] 2 All ER 3, where despite no formal assignment of a lease both parties acted as landlord and tenant and the tenant was thus estopped from denying that he was an assignee and was thus liable for rent. Carr v London & Northwest Railway Coy. (1875) L.R. 10 C.P. 307, a case of common law estoppel by conduct was there relied upon. It seems clear, however, that Rodenhurst Estates Ltd v Barnes was a clear case of convention and the Ramsden v Dyson principle would, in the light of contemporary decisions, clearly be applicable to it.

6. For example: it was necessary that the representation be effectively communicated to the representee, Roberts v Tucker (1851) 16 Q.B. 560; the representation was required to relate to a matter of existing fact, Taylor v Knapman (1884) 2 N.Z.L.R. 265; a statement as to future intention or promise was inadequate, Guy v Waterlow Bros & Layton Ltd (1909) 25 TLR 515; a statement of opinion was inadequate to establish the necessary representation, George Whitechurch Ltd v Cavanagh [1902] A.C. 117, H.L. The establishment of the requirements was thus a highly tenuous process which lent itself to innumerable fine, and sometimes, inane, distinctions.

clear distinction as between common law estoppel and the Ramsden v Dyson principle.

This movement of the Ramsden v Dyson principle into the area of common law estoppel by representation could be seen as a reversal of the trend which took place in Jorden v Money[7]. which it will be recalled, was determined in equity, but where distinctly common law principles were applied in finding that a statement of future intention could not amount to an estoppel. It could be argued that that celebrated but much criticised decision has already been outflanked by construing a representation of fact from what appears to be a statement of intention,[8]. and also by the application of the High Trees principle. The decision in Jorden v Money stands to be outflanked yet again by the development of the Ramsden v Dyson principle.

The Equity to Perfect a Gift But one Specialised Aspect of the Ramsden v Dyson Principle

A long established and well respected principle of equity is that laid down in Dillwyn v Llewelyn[9]. This was the equity to perfect an imperfect gift. The principle was aptly set out by Lord Westbury when he said;

> 'A voluntary agreement will not be completed or assisted by a court of equity, in cases of mere gift ... But the subsequent acts of the donor may give the donee that right or ground of

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7. (1854) 5 H.L. Cas. 185.
8. As was done in Salisbury (Marquess) v Gilmore [1942[2 K.B. 38, where a statement by landlords that they intended to demolish a building at the termination of a lease which, despite the wording, was held to be a representation of fact sufficient to support an estoppel.
9. (1862) 4 De G.F. & J. 517.

> claim which he did not acquire from the original gift... So if A puts B in possession of a piece of land, and tells him 'I give it to you that you may build a house on it', and B on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly. I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made'[10].

This specifies, it is submitted, the essential requirements to establish the Ramsden v Dyson principle. The making of the initial gift and the subsequent conduct of the donor in standing by while the donee acts to his detriment would amount to the raising of the required expectation. It is noted that detrimental reliance would also be required to establish this principle. The clear specification in the dicta of Lord Westbury that 'A voluntary agreement will not be completed or assisted...' but that it is subsequent acts of the donor which are vital infuses the element of acquiescence or encouragement thus serving still further to equate this principle with that of Ramsden v Dyson.

There have been a number of cases where the courts have applied both the Dillwyn v Llewelyn principle and the Ramsden v Dyson principle with no attempt to differentiate between them.[11]. This process was continued in Pascoe v Turner.[12].

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10. ibid at page 521.

11. See for example, Plimmer v Major etc of Wellington (1884) 9 App. Cas. 699; Inwards v Baker (1965) 2 QB 29; also Chalmers v Pardoe [1963] 1 W.L.R. 677; (1963) 3 All E.R. 552 where although neither principle was referred to it appears that both were equally applicable; see also cases referred to infra.

12. [1979] 2 All E.R. 945.

Dillwyn v Llewelyn preceded Ramsden v Dyson in point of time by some four years. Between 1895 and 1956 the Dillwyn v Llewelyn principle was very rarely applied as it appears to have been taken by the courts to have been subsumed in the wider Ramsden v Dyson principle, of which it was merely one aspect. However in 1956 there appears to have been something of a revival of that principle, as an independent head of liability, by its application by the New Zealand High Court in Thomas v Thomas.[13] Since that time Dillwyn v Llewelyn has been applied quite consistently.[14]

But even in quite recent cases there appears to have been a reluctance on the part of the courts to see Dillwyn v Llewelyn as an independant head of law. There has been, for example, a tendancy to see it as requiring the support of common law contract with the acquiescence of the representor, that is his raising of the necessary expectation, as the equivalent of consideration in contract.[15] It will indeed be recalled that in Dillwyn v Llewelyn itself Lord Westbury L.C. had used the expression 'to perform that contract'[16]. Also he apparently based the rule on an analogy with part performance. It is submitted, with respect, that any analogy which might have been drawn in earlier times between the Dillwyn v Llewelyn principle and contract, especially involving confusion as to the nature of consideration, is no longer appropriate, or indeed accurate.

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13. [1956] N.Z.L.R. 785

14. See cases referred to infra and supra.

15. As in Raffaele v Raffaele [1962] WAR 29; see also in Re Diplock [1947] Ch. 716, where Wynn-Parry J.treated Dillwyn v Llewelyn as a species of contract and Vaughan v Vaughan [1953] 1 Q.B. 762, where Denning L.J. cited as authority for the proposition that to establish a contractual licence there must be a promise supported by consideration or acted upon.

16. (1862) de D.F. & J. 517 at page 521.

The question remains then whether the courts are correct in regarding the Dillwyn v Llewelyn principle as but one aspect of the wider Ramsden v Dyson principle. There is a clear analogy between the two principles in several respects. It should be pointed out that the apparent extension in the scope which has taken place in the Ramsden v Dyson principle in recent times would tend to indicate a greater general willingness on the part of the courts to extend it to situations which might otherwise have been seen as the province of the narrower Dillwyn v Llewelyn principle.

Firstly, the Dillwyn v Llewelyn principle is narrower in that it requires as its starting point an intention to make a gift. This appears to require a specific promise. This promise proves to be invalid at law because the gift is imperfect, that is the donor has not complied with the legal requirements to perfect the gift. It is submitted that this would be sufficient, in many instances, at least to satisfy the requirement of the raising of the expectation necessary for the Ramsden v Dyson principle. But this would probably depend upon the conduct of the donor following, or subsequent to, the making of the promise. In terms of the Dillwyn v Llewelyn principle this future conduct of the donor, subsequent to the making of the promise of the gift, was vital to the establishment of the equity. This may have gone somewhat further than the requirement necessary to raise the expectation to establish Ramsden v Dyson but whether this is so or not is not ascertainable from the decided cases.

Likewise detrimental reliance is common to both principles. The representee cannot succeed in establishing either the Ramsden v Dyson principle or that in Dillwyn v Llewelyn unless he can establish detriment if the principle is not asserted in his favour. As yet there would appear to be no distinction between the detriment required to establish

either.

One tenuous line of demarcation between the two principles could still exist in respect to the possible remedy. The Dillwyn v Llewelyn principle relies initially upon a promise, that is a promise to make a gift and the question arises whether any remedy granted under that principle is limited to the fulfilment of that promise only. It has been shown that in respect to the Ramsden v Dyson principle the remedy available is not limited to a making good of the expectation raised but it entirely at the discretion of the court.[17]. It is not clear, as yet, whether the same discretion is available to the court when the Dillwyn v Llewelyn principle is successfully pleaded.

The clear diffusion between the Dillwyn v Llewelyn principle and that in Ramsden v Dyson is aptly demonstrated by the decision of the Court of Appeal in Pascoe v Turner[18]. where, it will be recalled, words indicating the gift of a house property had been made by the male to the female party of a defacto relationship and, after having spent money upon repairs, the woman sought to enforce the promise. The Court there did not apparently concern itself with ascertaining the issue of whether there had been a promise of a gift but pointed out that '... the plaintiff not only stood by and watched but encouraged and advised, without a word to suggest that she was putting her money and her personal labour into his house. What is the effect in equity?[19]. ... The cases in point illustrating that principle in relation to real property are Dillwyn v Llewelyn, Ramsden v Dyson...'[20].

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17. See under 'Remedies: Proprietary Rights Deriving From the Ramsden v Dyson Principle, Chapter nine supra
18. (1979) 2 All E.R. 945.
19. (1979) 2 All E.R. at page 949
20. ibid

This decision makes no clear attempt to differentiate between the two principles but appears to treat the two as illustrating some broader principle of equity.

One approach may be to treat the principle confirmed in Dillwyn v Llewelyn as part of the law relating to gifts, that is more appropriately considered as an aspect of the law of property. It is submitted that pending some clear formulation of the Dillwyn v Llewelyn principle as a distinct head of liability in equity it is more appropriately considered as part of the wider Ramsden v Dyson principle.

The Ramsden v Dyson Principle as a Basis for Waiver.

The concept of waiver is not clearly defined. It is most frequently taken as applying in contract where one party has agreed to forbear upon the performance of a term of the contract. In this instance waiver is not easy to distinguish from situations which could be covered by that form of estoppel confirmed in High Trees House Ltd v Central London Property Trust[21]. However there is no doubt that waiver is not confined to strictly contractual situations.

The possible application of the Ramsden v Dyson principle to cases of waiver was illustrated by the decision of the House of Lords in Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd[22]. The point in issue there was the waiver of a right to a defence under a statute. Lord Diplock pointed out that 'The ordinary principles of estoppel apply...'[23] to this category of waiver. He went on to point

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21. [1947] K.B. 130; [1956] 1 All E.R. 256.
22. [1971] A.C. 850
23. ibid at page 883.

out that estoppel in the 'strict sense' was unavailable in that instance because there was no representation of existing fact. However he then specified that either High Trees estoppel or 'the older doctrine of acquiescence expounded by Fry J. in Willmott v Barber'[24]. may be applicable. He then proceeded to apply the probanda of Fry J. and reached the conclusion that they were not fulfilled in the instant case.

If this line of reasoning is developed the results would appear to be quite remarkable. What Lord Diplock appears to have been searching for was a firm foundation upon which to base the possible waiver of the right to a defence. But in view of what he said it would be a very easy step to extend the Ramsden v Dyson principle into the area of non contractual waiver and possibly encroach upon the domain of what is now regarded as High Trees estoppel.

The High Trees principle commenced life in what could be described as a somewhat uncertain manner. Denning J. (as he then was) was clearly still dogged with the conception of estoppel as limited to a representation of an existing fact, thus continuing to pay deference to the ghost of Jorden v Money. Moreover he concentrated upon the enforcement of a specific promise, which in that instance was in writing, and which in his view could not give rise to an estoppel for the simple reason, following Jorden v Money, was not a statement of existing fact but was merely a promise to do something in the future. But he distinguished Jorden v Money upon the ground that there the promise was not intended to be legally binding.

Denning J. at no time referred to Ramsden v Dyson but instead fell back upon a line of authority dealing with the enforcement of promises in

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24. ibid.

equity where that promise had been acted upon.[25]

However later developments of the High Trees principle, it is submitted, have tended to bring it much closer to that of Ramsden v Dyson. Thus in Charles Rickards Ltd v Oppenhiam.[26] the conduct of the representor was held sufficient to invoke the High Trees principle; in Ajayi v R.T. Briscoe (Nigeria) Ltd[27] detrimental reliance was confirmed as an essential ingredient of High Trees estoppel.

On the other hand it may be possible to see the Ramsden v Dyson principle as applicable in contract in cases where the High Trees principle clearly will not operate. It is claimed that the High Trees principle is limited to contractual situations[28]. It is clear that the Ramsden v Dyson principle is wider in scope and bearing in mind the decision in Taylors Fashions Ltd v Liverpool Victoria Trustees Ltd there would appear to be no reason to preclude the Ramsden v Dyson principle from forming the basis of a waiver of contractual provisions.

In Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd.[29] the High Trees principle was unsuccessfully pleaded in an attempt to establish an estoppel based upon a letter, written after the contract had been concluded, and changing what had been agreed in the contract. It is submitted that if both the parties had accepted the

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25. These were; Hughes v Metropolitan Railway Company (1877) 2 App. Cas. 439; Birmingham and District Land Co. v London & North Western Railway Co (1888) 40 Ch.D. 268; Salisbury (Marquess) v Gilmore (1942) 2 K.B. 38.

26. [1950] 1 K.B. 616.

27. [1964] 1 W.L.R. 1326; (1964) 3 All E.R. 556.

28. Hogenas v Hatton [1955] N.Z.L.R. 684; but see Evenden v Guildford City Association Football Club Ltd (1975) Q.B. 917.

29. [1972] A.C. 741; (1972) 2 All E.R. 271.

contents of the letter and mutually acted upon them the Ramsden v Dyson principle could have been asserted.

The later decision of Robert Goff J. in the Queens Bench Division in Societe Italo-Belge pour le Commerce et l'Industrie S.A. v Palm and Vegetable Oils (Malaysia) Sdn Bhd 'The Post Chaser'[29a] shows a quite remarkable merger of the High Trees principle with aspects of the Ramsden v Dyson principle. The decision was clearly based upon the High Trees principle but Robert Goff J. confirmed that 'an unequivocal representation ... that they did not intend to enforce their strict legal right' was sufficient to found the High Trees principle and that it did not require a statement of existing fact. But that case is probably more significant in confirming the concept of unconscionability as applicable to High Trees situations. This would appear to supply an answer to the problem which has been encountered in High Trees situations but is not so evident in Ramsden v Dyson situations and that is the issue of the resumption of rights. In determining whether the representor can resume his legal rights under the High Trees principle Robert Goff J. appears to have applied the same principle as has been applied where the Ramsden v Dyson principle is apposite. That is the representor can resume his former position only where it would not be inequitable to the representee for him to do so. That is once the parties have so altered their position that the equity has crystallised in favour of the representee there can be no resumption of the former position where it would be inequitable to do so. In applying this concept of unconscionability the specific situation would have to be taken into account. Thus the continuing contractual relationship which would be a factor in instances where the High Trees principle is applicable, would probably have to be considered in determining what was unconscionable in specific cases. Thus for example although the reversion to a former position upon the

29a [1982] 1 All E.R. 19

giving of reasonable notice has been considered as a factor under High Trees estoppel this could be considered as merely specific to the contractual relationship rather than some clear theoretical distinction between the High Trees principle and the Ramsden v Dyson principle.

It could be argued that the High Trees principle would appear to be based upon how to satisfy an equity that has arisen after a contract has been concluded rather than upon any general concept that non contractual promises must be kept and kept in full. If the alternate view is adopted that the law should focus not upon the making good of promises or representations but upon when and to what extent expectations should be fulfilled, then it would appear that we have a common basis for the application of both the High Trees principle and the Ramsden v Dyson principle.

It is submitted that the decision of the House of Lords in Woodhouse A.C. Israel Cocoa Ltd. S.A. v Nigerian Produce Marketing Co. Ltd.[30] to the effect that 'an ambiguous statement has (never) formed the basis of a purely promissory estoppel'[31] was unfortunate. As the facts in that case did not warrant it there was no consideration in that case of when the High Trees principle could arise in the absence of an express representation. As Lord Salmon explained in a later case;

> 'To make an unequivocal representation or waiver it is not necessary for the buyers to say 'we hereby waive it' It is quite enough if they behave or write in such a way that reasonable sellers would be led to believe that the buyers were waiving any defects there might be in the notice....'[32]

30. (1972) A.C. 741.
31. Ibid at page 757.
32. Bremer Handelsgesellschaft mbh v Vanden Avenne - Izegem PVBA (1978) 2 Lloyds Rep. 109 at page 126.

This, it is submitted, is an approach clearly indicating that the raising of an expectation will be sufficient to found the High Trees estoppel just as the raising of an expectation is sufficient to found the Ramsden v Dyson estoppel.

Conclusion: The Ramsden v Dyson Principle as a Distinct Head of Liability in Equity?

The rejection of a strict categorisation of estoppel appears to be an accurate reflection of current developments in the law.

It must be remembered that, to some extent, the evolution of bench mark precedents, which have the effect of according nomenclature to equitable principles, is unfortunate and is, indeed, a relatively modern phenomenon. It is probable that the robust Chancery Judges of past years would have derided such a practice as it would have served to limit the scope of equity to intervene.

It is possible to see all the areas of law referred to above, plus the Ramsden v Dyson principle itself, as amounting to nothing more than a bundle of examples of instances where equity has, in the interests of rectifying an unconscionable situation, deemed it appropriate to assert jurisdiction.

Alternatively, it is possible to perceive the Ramsden v Dyson principle as the manifestation of a basic equitable estoppel which began life as a potentially relatively narrow concept, limited to real property, and then by a gradual, incremental process, extended its scope to gifts, to give rise to what is now sometimes referred to as the Dillwyn v Llewelyn principle, to contract, in the form of the High Trees principle, and eventually into statutory waiver. It is possible to take the matter further and see the doctrine of part performance in the law of contract as but one aspect of the same principle.

Current trends with the emphasis placed upon the rectification of unconscionable situations and away from the application of rules certainly indicate a reversion back to the broad conception of equitable intervention.

Chapter Eleven

THE LIMITS OF THE PRINCIPLE MAKE AN APPEARANCE

Introduction: The Pendulum Begins to Swing Back.

Following the decisions of the Court of Appeal in Crabb v Arun District Council [1]. Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [2]. and Habib Bank Ltd v Habib Bank AG Zurich, [3]. it appeared that the Ramsden v Dyson principle was in full flood. Some very recent decisions, however, appear to have served to indicate the possible limits to the principle.

These possible reins upon the scope of the Ramsden v Dyson principle have assumed several different thrusts. There would appear to be some broad general judicial misgivings over the lengths to which the principle has extended. This would include the hint of a reversion away from the application of the principle in favour of the more narrowly based estoppel by specific representation. A clear attempt has been made to limit the proprietary rights deriving from the principle.

There would appear to be limits set to the extension of the concept of convention as the initial steping stone for the principle.

The historic and intricate problem, still it appears, by no means resolved, of the relationship between estoppel and statutory authority has again surfaced. The very recent authority indicates yet again the impotence of estoppel in the face of statutory authority.

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1. [1976] 1 Ch. 179.
2. [1982] Q.B. 84.
3. [1981] 2 All E.R. 650.

But it is not finally established, by any means, that estoppel can play no role at all where statutory authority is involved.

It is not possible to determine whether these very recent trends are the beginning of a wholesale retreat from the broad application of the Ramsden v Dyson principle to a more restrictive application of estoppel and perhaps a reversion back to the more limited estoppel by express representation, or whether they represent the introduction of a period of consolidation. There has not been any attempt to clearly demarcate the role of the Ramsden v Dyson principle from other heads of estoppel.

It is reasonable to assume that the departure of Lord Denning M.R. from the judicial scene would have the effect of taking some of the momentum from the liberal application of the principle as seen in Crabb v Arun District Council and in Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd.

A Retreat From the Broad Approach to the Ramsden v Dyson Principle Spearheaded by Lord Denning.

That a visible retreat from the broad approach to the Ramsden v Dyson principle as laid down by Lord Denning has now set in is indicated by several recent decisions. But that this broad approach was not to attract universal judical agreement was evident in Western Fish Products Ltd v Penwith District Council and another [4]. where it was sought to invoke the Ramsden v Dyson principle to prevent a District Council from resiling from a decision which had been made by one of its planning officers.

In delivering the judgment of the Court of Appeal Megaw L.J. is emphatic that the principle ought to be carried no further. He went further;

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4. [1981] 2 A11 E.R. 204.

'We know of no case, and none has been cited to us, in which the principle set out in Ramsden v Dyson and Crabb v Arun District Council has been applied otherwise than to rights and interests created in and over land. It may extend to other forms of property: see per Lord Denning M.R. in Moorgate Mercantile Co Ltd v Twitchings ... In our judgment there is no good reason for extending the principle further. As Harman L.J. pointed out in Campbell Discount Co Ltd v Bridge [1961] 2 All E.R. 97 at 103, [1961] 1 Q.B. 445 at 459, the system of equity has become a very precise one. The creation of new rights and remedies is a matter for Parliament, not the judges'. [5.]

This dicta was set down before the decision of the Court of Appeal in Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd, which, in fact, confirmed the principle in Crabb v Arun District Council. But Lord Denning M.R. played a significant role in both those judgments. Later cases hint at a move towards the direction taken by Megaw L.J. if not, as yet, at least, going so far as to confirm that the creation of new rights is a matter for Parliament.

Further misgivings over the broad application of the principle, based upon unconscionability appear by way of very fleeting dicta in the judgment of the Court of Appeal, delivered by Oliver L.J. in Habib Bank Ltd v Habib Bank AG Zurich [6.] After having listened to counsel recite from his own judgment in Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd, to

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5. Ibid at page 218.

6. [1981] 2 All E.R. 650.

the effect that '... the Ramsden v Dyson ... principle ... requires a very much broader approach ...' [7]. Oliver L.J. ruefully replied 'whilst having heard the judgment read by counsel I could wish that it had been more succinct, that statement at least is one to which I adhere' [8].

Oliver L.J. did however go on to find that the conditions of the principle were satisfied in Habib Bank Ltd v Habib Bank AG Zurich and probably not too much can be read into his attitude to the citation from his previous judgment.

A further and possibly more significant step back from the Ramsden v Dyson principle appears to have been taken in Avon County Council v Howlett [9]. The Court of Appeal could well have determined the issue of overpayments of wages made by a local authority to an employee upon the basis of the Ramsden v Dyson principle. Instead however, after having paid cursory attention to Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank, the Court preferred to base the estoppel, which it there found to exist, upon the specific representation by the employer, to the employee, that he was entitled to treat the money as his own. The Court found the supporting authority in a series of decisions dealing with the payment of money by mistake. [10].

It would appear that the issue of estoppel in Avon County Council v Howlett could have equally been determined under the Ramsden v Dyson principle. The necessary expectation had clearly been raised by the representor County Council.

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7. [1982] 1 Q.B. 133 at page 151 cited in Habib Bank Ltd v Habib Bank AG Zurich (1981) 2 All ER at page 666.

8. [1981] 2 All ER at page 666./

9. [1983] 1 All ER 1073.

10. Skyring v Greenwood (1825) 4 B & C 281, (1824-34) All ER Rep 104, Holt v Markham (1923) 1 K.B. 504, Lloyds, Bank Ltd v Brooks (1950) 6 Legal Decisions Affecting Bankers 161.

However Avon County Council v Howlett serves to bring out what could be a limitation upon the application of the Ramsden v Dyson principle as against other heads of estoppel, and, in particular, estoppel by representation. In that case estoppel was raised as a defence to an action in restitution as the Avon County Council, which was the plaintiff, was seeking to recover the overpayments of wages from the defendant employee who raised the estoppel as a defence to the action in restitution. The Court found that the overpayments were the result of a mistake of fact. The burden of proving this, on the balance of probability, was successfully discharged by the County Council and had not the defendant representee been able to raise estoppel the action in restitution would have succeeded.

The paucity of authority in this area is indicated by the fact that extensive reference was made, especially in the judgment of Slade L.J. to Goff and Jones 'Law of Restitution' which specifies the requirements of estoppel as a defence to a claim in restitution as; a. the plaintiff must generally have made a representation of fact which led the defendant to believe that he was entitled to treat the money as hiw own; b. the defendant must have, bona fide and without notice of the plaintiff's claim, consequently changed his position; c. the payment must not have been primarily caused by the fault of the defendant. [11.]

In Avon County Council v Howlett there was a specific representation and the Court was thus not called upon to consider the applicability of the Ramsden v Dyson principle as a defence to a claim for restitution in that instance.

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11. Goff Sir Robert and G. Jones 'Law of Restitution' 2nd ed. London, Sweet and Maxwell, 1978 pages 554-555.

In respect to restitution a gap now appears to have opened between the English and New Zealand law. It is clear that estoppel can operate as a defence to an action in restitution in both jurisdictions. However New Zealand has gone further and provided a statutory defence[12]. which incorporates the defence of change of position. This must not be confused with estoppel. It was confirmed in Hollidge v Bank of New Zealand[13]. that this defence is an alternative to estoppel[14]. If estoppel is established then section 94B is irrelevant[15]. Under New Zealand law the courts appear to have made a clear distinction between the defence of estoppel and that provided by statute[16]. This distinction is not so clear cut under present English law, where some confusion appears to exist as to the existence of change of position as a defence as separate from estoppel as a defence.

As indicated above the present section 94B does not include estoppel as an ingredient as there is no requirement of a representation. However the viability of that provision as a defence depends largely upon the standard of detriment required of the payee. It has been indicated that a higher standard of detriment is required in cases of change of position than in estoppel[17]. If the limited requirement of detriment as seen in recent estoppel cases[18]. can be maintained it

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12. Section 94B Judicature Act 1908
13. (High Court, Nelson, 29 March 1982 (M 1840) Hardie Boys J).
14. Ibid at page 8.
15. This defence exists in American Law; Restatement of the Law of Restitution, paragraph 142.
16. See e.g. Davies v Bank of New South Wales [1981] 1 N.Z.L.R. 262 which was determined on the statute as estoppel was regarded as irrelevant.
17. C.f. Jones G.H. 'Change of Circumstance in Quasi-Contract' (1957) 73. L.Q.R. 49.
18. As in Avon C.C. v Howlett supra

could be that estoppel will be a more useful weapon in restitution than change of position. This would especially be so if the raising of an expectation became established as sufficient to provide the foundation for the necessary estoppel.

As long ago as 1944 in Transvaal and Delagoa Bay Investment Co. v Atkinson[19]. it was stated that the plaintiff must have 'expressly or impliedly represented to the defendant that the money paid was truely due and owing to the defendant'[20]. This would appear to indicate that the representation necessary to found an estoppel as a defence to an action in restitution is not limited to express representations. The raising of an expectation would probably suffice.

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19. [1944] 1 All E.R. 579.
20. Ibid at page 585.

Limitation of Proprietary Rights Deriving From the Principle.

In Western Fish Products v Penwith District Council the Court of Appeal distinguished Crabb v Arun District Council and limited the proprietary right deriving from the principal as required to be over the land of another. In Western Fish Products v Penwith District Council the representee had improved its own land in the expectation, raised by a representative of the Council, that it had the required planning authority. According to Megaw L.J. who delivered the judgment of the Court of Appeal, 'There was no question of their acquiring any rights in relation to any other person's land, which is what proprietary estoppel is concerned with' [21].

With respect this would appear to represent a quite unwarranted restriction of the Ramsden v Dyson principle. What the representee sought here was to raise estoppel to prevent the Council denying planning authority. It could be argued that this is hardly a proprietary right. In any event the principle is clearly not limited to the creation of proprietary rights.

In Western Fish Products v Penwith District Council it was obvious that an equity had been raised in favour of the representee. He had expended money, albeit on his own land, in the expectation of possessing the requisite planning approval. He had suffered detriment. On this point there would appear to be no reason why the Ramsden v Dyson principle ought not to have been invoked.

Limits Set Upon Convention as a Foundation for the Ramsden v Dyson Principle.

If Oliver L.J. in Habib Bank v Habib Bank AG Zurich, [22] indicated some misgivings over the broad approach to application of the Ramsden

21. [1981] 2 All E.R. 204 at page 219.

22. [1981] 2 All ER 650.

v Dyson principle in Keen v Holland [23]. he went much further and indicated clear limits to the extension of the principle in respect to situations of convention. It will be recalled that convention had clearly been laid down in Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [24]. and Amalgamated Investment and Property Co v Texas Commerce International Bank Ltd [25]. as one possible basis for the Ramsden v Dyson principle.

But Oliver L.J. in delivering the judgment of the Court of Appeal in Keen v Holland was not prepared to apply that principle to the instant facts despite that Amalgamated Investment v Texas Commerce International Bank was vigorously pleaded by council in support of the existence of estoppel in that case.

Keen v Holland involved a conflict between an agricultural tenant and his landlords. Legislation, that is the Agricultural Holdings Act 1948 (U.K.) which served to protect tenants of agricultural holdings, was in issue and relevant to this tenancy. The landlords required repossession of the holding and gave the tenant notice. The landlords were, however, prepared to allow the tenant to remain on until he had obtained another holding suitable to his needs. The landlords extended the tenancy upon two separate occasions to accommodate the tenant who was unable to find alternate premises. However the extension was granted upon the understanding, agreed to by both the parties, that any further tenancy negotiated would be such as not to attract the protection of the Agricultural Holdings Act 1948. A third tenancy was then agreed to but when this expired the tenant sought the protection of the Act to remain in possession. The landlords pleaded estoppel and relied upon the

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23. [1984] 1 All E.R. 75.

24. [1982] 1 Q.B. 133. n

25. [1982] 1 Q.B. 84

principle of convention as laid down in Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank. The substance of the convention was that in respect to the first two extensions of the tenancy both the parties had accepted that any tenancy granted would be such as not to attract the protection of the Act. This was therefore, according to the landlords, the basis upon which the third tenancy was granted.

This argument Oliver L.J. was not prepared to accept. He distinguished the earlier decision upon the ground that the instant case was '... not strictly a case of the parties having established, by their construction of their agreement or their apprehension of its legal effect, a conventional basis on which they have regulated their subsequent dealings as in the Amalgamated Investment case'[26]. He went on to point out that the dealing alleged to give rise to the estoppel is the entry of the parties in this particular case into the agreement itself in the belief that it would produce a particular legal result, and that, in fact, for reasons that had nothing to do with the defendant the plaintiff got it wrong. He pointed out that what counsel appears to be contending for is a much wider conventional estoppel that previously established by the authorities. That is one where parties are shown to have a common view about the legal effect of a contract into which they have entered and it is established that one of them would not, to the other's knowledge, have entered into it if he had appreciated its true legal effect, they are, without more, estopped from asserting that the effect would be otherwise than originally supposed.

Although Oliver L.J. did concede that this view of convention was supported by the broad proposition put forward by Lord Denning M.R. that 'When the parties to a transaction proceed on the basis of an underlying

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26. [1984] 1 All E.R. at page 82.

assumption ... on which they conducted the dealings between them, neither of them will be allowed to go back on that assumption' [27]. he pointed out that Lord Denning M.R. was alone in expressing the proposition as broadly as that.

With respect it would seem that the distinction made between the instant facts and those in Amalgamated Investment and Property Co Ltd v Texax Commerce International Bank Ltd, would appear to be more apparent than real. In Keen v Holland it was clear that both parties had clearly negotiated upon the basis that the tenancy negotiated would not be a protected tenancy. The tenant must clearly have understood this when he took advantage of a delay in signing the lease to claim a tenancy from year to year which could only be determined in accordance with the provisions of the Agricultural Holdings (Notices to Quit) Act 1977. (U.K.).

Equally unimpressive was the treatment of unconscionability in Keen v Holland. Counsel for the landlords argued that it was unconscionable for the tenant to now rely upon the statute. But the judge in the Court below had found that it was not unconscionable for the tenant to rely upon the statute because of the unequal bargaining position as between landlord and tenant and having regard to the purpose of the legislation. This was apparently accepted by the Court of Appeal.

The wider subterranean stream which appears to flow through the decision in Keen v Holland is a retreat from the broad approach which was spearheaded by Lord Denning M.R. in the earlier decisions. The case would seem to indicate that with the departure of Lord Denning from the judicial scene the momentum has been lost from the broad sweeping development of the Ramsden v Dyson principle.

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27. [1982] Q.B. 84 at page 122.

On the face of it Keen v Holland looks to be a stronger case for equitable relief than either Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd or Amalgamated Investand Property Co v Texas Commerce International Bank Ltd, as in both those instances a mistake had been made as to the true position, whereas in Keen v Holland the party who sought to resile and take advantage of the statute had full knowledge, all along, as to the basis upon which the negotiations were being conducted. To see the distinction between these cases upon the ground of unconscionability; it is unconscionable to resile where both parties have acted upon the basis of a common mistake as to the true position, but it is not unconscionable to resile when one has full knowledge of the intentions of the other party.

The Viability of the Ramsden v Dyson Principle in the Face of Statutory Authority.

Keen v Holland raised again the issue of the effectiveness of the Ramsden v Dyson principle, and estoppel in general, in the face of statutory authority. This subject is extensive in its scope and the point in issue in Keen v Holland, although very broad within itself, covered only a very limited aspect of the total area of the relationship between estoppel and statutory authority. However the finding of the Court of Appeal in that case served to confirm what appears to be the current attitude of the courts to the application of estoppel where a statute is involved.

In its application in the face of statutory authority it is not possible, to any substantial extent, to sift out the Ramsden v Dyson principle from estoppel as a whole. Generally the application of the principle merges into the broader issue of the viability of estoppel, as a theoretical concept, in this area. However it will be shown that there have been a very few specific instances where the principle itself, as distinct from a wider concept of estoppel, has been applied.

As indicated the issue in Keen v Holland was wide, and was whether or not the parties could contract outside the provisions of the Agricultural Holdings Act 1948 (U.K.).

The Act did not specifically prohibit contracting out of the particular provision in issue, although there were such prohibitions in regard to other sections of the Act. It was contended by counsel for the landlords that the parties were attempting to conclude an agreement which did not attract the protection of the Act, and which was therefore not prohibited by the Act. It was submitted that, if such a term was agreed, there was no legal impediment to the parties being estopped from denying that that was what they had, in fact, done.

This was an argument which was soundly rejected by the Court of Appeal with the simple rejoinder that 'Once there is in fact an actual tenancy to which the 1948 Act applies, the protection of the Act follows and we do not see how ... the parties can effectively oust the protective provisions of the Act by agreeing that they shall be treated as in-applicable' [28]. The Court found that once the factual situation described in the Act is found to exist the terms of the relevant section were mandatory. The Court concluded '... it is a little difficult to see how the parties can, by estoppel, confer on the court a jurisdiction which they could not confer by specific agreement' [29].

With respect this contention would appear to be taking the matter somewhat too far. It would appear that there was no specific provision prohibiting the contracting out in respect to the relevant provisions here. But there were prohibitions in respect to contracting out of the Act in respect to other provisions which were not in issue in the instant case. This being so it is not easy to see the objection taken by the

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28. [1984] 1 All E.R. pages 81-82.

29. ibid page 82.

Court to the attempt of contract outside the Act in this specific instance. If the legislature had clearly intended that there should have been no contracting out in respect to this specific provision then it surely would have specifically provided for that. The Court of Appeal appears to have looked at the spirit of the Act as a whole, which was, of course, the protection of agricultural tenants, and interpreted the facts of the case before it in the light of what it saw as the spirit.

In respect to the creation of a jurisdiction which could not be conferred 'by express agreement' it is difficult to see that what the parties did in this instance went anywhere near that. If a specific course of action is not prohibited by the Act then presumably there is nothing to prevent the parties from engaging in it. It could well be argued that in declining the estoppel the Court prevented the parties from attempting what they would have been quite entitled to do under the Act.

This can be contrasted with the position in Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd, where, it will be recalled the High Court had no hesitation in applying the Ramsden v Dyson principle to enforce the provisions of an option which was void because of non registration under the Land Charges Act 1925. (U.K.). Surely this is going further than creating a jurisdiction which was not conferred by the Act. The application of the Ramsden v Dyson principle there rendered effective something which was, in fact, void according to the Act.

On the other hand the decision in Keen v Holland, on this point, would appear to be in the broad spirit of not extending the estoppel to trammel statutory powers which appeared in the earlier decision in Western Fish Products Ltd v Penwith District Council,[30] where the Ramsden v Dyson principle was specifically pleaded to attempt to hold a District Council to a representation which had been made by one of its planning officers.[31] As indicated above, in that case, the fundamental policy exhibited by the

30. [1981] 2 All ER 204.

31. See also Rootkin v Kent County Council [1981] 2 All E.R. 227 where estoppel was declined thus enabling a local authority officer to revise a discretion which had been based upon a misconception.

Court appears to have been not to extend further the scope of the Ramsden v Dyson principle.

On the other hand it is possible to go back to the House of Lords decision in Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd.[32] which was another case where a statute dealing with the landlord tenant relationship was in issue and Lord Diplock specifically referred to the construction of statutes designed for the benefit or protection of one party, thus;

> 'Upon the purposive approach to statutory construction this is the reason why in a statute of this character a procedural requirement imposed for the benefit or protection of one party alone is construed as subject to the implied exception that it can be 'waived' by the party for whose benefit it is imposed even though the statute states the requirement in unqualified and unequivocal words' [33].

Admittedly this is referring to matters of procedure but could not the situation have been stretched to cover the facts of Keen v Holland. In Kammins Ballrooms v Zenith Investments Lord Diplock had no hesitation in applying the Ramsden v Dyson principle but found that the requirements of it had not there been fulfilled. Could not it be argued that the tenant had expressly waived his protection in Keen v Holland by negotiating to conclude an agreement which did not attract the protection of the Act. It would have appeared appropriate in Keen v Holland that the Ramsden v Dyson principle should have been allowed to prevent the tenant from falling back upon the protection which he had clearly waived.

Generalisation is difficult in respect to the application of the Ramsden v Dyson principle, or indeed estoppel as a whole, to statutory

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32. [1971] A.C. 850.

33. [1971] A.C. 850 at page 881.

authority. This is because of the variety and multiplicity of circumstances which can arise under a statute, ranging from the actual exclusion of a statute to the exercise of discretions permitted by statute, to ostensible authority to the waiver of provisions. The mood of the Court of Appeal currently appears to be opposed to allowing the Ramsden v Dyson principle to operate so as to trammel the exercise of statutory authority.

It has been readily accepted by the courts that estoppel would not operate to render lawful that which the legislature, has, by statute, rendered unlawful, [34.] or to give effect to an action which was ultra vires. [35.] But at quite an early point of time the courts were prepared to go further and lay down a general principle to the effect that a public authority cannot be estopped from performing its public duties;

> 'No corporate body can be bound by estoppel to do something beyond its powers, and therefore cannot be bound to do something which is regulated by statute in any way other than the statute requires' [36.]

Lord Denning later attempted to carve out an exception to this general rule in allowing estoppel in cases of representation by officers of government authorities, thereby binding the authorities, irrespective of whether the representations were correct. [37.] In other words he sought to extend the concept of ostensible authority to render government agences bound by representations which had been made by officers.

Recent decisions would indicate that even in this limited area the final nail is in the coffin. The role of estoppel in general, and the Ramsden v Dyson principle in particular, in the face of statutory authority

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34. Chalmers v Pardoe [1963] 3 All ER 552.

35. Maritime Electric v. General Dairies [1937] A.C. 610.

36. Editorial note [1937] 1 All ER 748.

37. Wells v Minister of Housing [1967] 2 All ER 1041., Lever (Finance) Ltd v Westminister Corporation [1971] 1 Q.B. 222.

is now far from clear. The best conclusion to draw at present is that it has at best a very limited role.

It may be that equity will still assert jurisdiction to prevent a statute being used as a vehicle of fraud. The decision in Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd. (in relation to the representee Old & Campbell) could be justified on that bais. The representor landlord had encouraged expenditure upon the property which he could have taken the benefit of had not the Ramsden v Dyson principle been asserted. The option in dispute there, it will be recalled was invalid because of non registration under the Land Charges Act 1925 (U.K.)

Conclusion; The Broad Approach of Lord Denning Now Seen as Too Broad?

That there has been some retreat from the broad approach to the application of the Ramsden v Dyson principle seen in such cases as Crabb v Arun District Council and Amalgamated Investment and Property Co v Texas International Bank, is clear. But what is not clear is the direction and extent of this retreat.

The objections expressed to an extension of the Ramsden v Dyson principle, as, for example, those of Megaw L.J. in Western Fish Products v Penwith District Council, have assumed, so far, a very general complexion. The decision of the Court of Appeal in Keen v Holland would appear to amount to quite a jolt to the principle and could well be based upon a general reluctance on the part of the courts to allow for any further extension of it.

In respect to its application to situations where statutory authority is sought to be impeded the retreat from the application of the principle, as with the application of estoppel as a whole, would seem to be more definite. The current state of the law in this area would appear to be that the Ramsden v Dyson principle is not available as against the exercise of powers conferred by statute. While it is true that the House of Lords decision in Kammins Ballrooms v Zenith Investments, still stands in

respect to the waiver of a procedural provision contained in a statute, it remains to be seen whether this will be built upon.

One is left with the conclusion that the departure of Lord Denning from the judicial scene has left the Ramsden v Dyson principle without a powerful advocate. It is probable that he took the principle rather too far in believing that it could sustain itself upon such a wide base as unconscionability for any length of time. Some of the more profound problems associated with such an approach will be considered in the next chapter. There are no present indications that there has been a revival of constraints upon the principle. In particular the probanda of Fry J. in Willmott v Barber have not, so far, shown that they will again come to the fore as requiring to be satisfied before the Ramsden v Dyson principle can be successfully pleaded. To this extent the principle is still, to use the words of Lord Denning M.R., 'shorn of limitions' [38].

At the same time the authorities have not provided any clear indication of the intention of retreating from the concept of the creation of an expectation as a requirement of the conduct of the representor. There still seems to be a considerable degree of latitude permitted in respect to the conduct required of the representor in order to provide a foundation stone for the application of the principle.

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38. [1982] Q.B. 84 at page 121.

Chapter twelve

CONCLUSION: WHITHER THE RAMSDEN V DYSON PRINCIPLE.

Introduction: From Pragmatism to Principles Back to Pragmatism.

In reviewing the development of the Ramsden v Dyson principle from its inception by the courts of equity, until the present day, it is possible to perceive a drift in the basis of the administration of the principle. From a position of being administered upon the basis of pragmatism in its very early years the principle sustained a period, in the later years of the nineteenth century, when attempts were made to subject it to rules, until it finally emerged again in the later years of the present century as based essentially upon pragmatism. [1.]

Even with the handing down of the House of Lords decision in Ramsden v Dyson in 1866, the principle was still essentially an indeterminate head of equity, to the broad effect that equity may assert jurisdiction in instances where a party had suffered loss, while another party stood by and allowed the first party to act to his detriment. The decision in Ramsden v Dyson itself, did not significantly develop the principle, but did help to define and identify it in according it the maximum of authority in respect to precedent and giving it nomenclature. But even with the handing down of the House of Lords decision the principle could still reasonably be described as but nothing more than a bundle of instances in which equity had shown that it was prepared to grant relief.

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1. C.f. Atiyah P.S. 'From Principles to Pragmatism Changes in the Function of the Judicial Process and the Law' An Inaugural Lecture Delivered Before the University of Oxford on 17 February 1978. Clarendon Press, Oxford 1978.

The systematisation which took place shortly after the House of Lords decision was comprised mainly of setting out the conditions of unconscionability. This took the form of a series of probanda spelt out by Fry J. in Willmott v Barber. [2] This did not, of itself, take the principle away from its equitable origins. The administration of the Ramsden v Dyson principle was still basically to rectify situations of unconscionability. However the probanda tended to provide a vehicle whereby the principle could be detached from its base in that the rules could be emphasised to the exclusion of the fundamental basis of the principle.

The probanda of Fry J. together with other rules which evolved, were subsequently, upon frequent occasions, resorted to as defences. Had they been rigidly applied as defences they could well have proved very effective in that role and would thus have served to limit the scope of the Ramsden v Dyson principle.

However from the mid 1960's Lord Denning M.R. perceived the Ramsden v Dyson principle as having a much wider role. He saw it, together with estoppel as a whole, as a weapon which was 'one of the most flexible and useful in the armoury of the law' [3] and as a 'principle shorn of limitations' [4] which could thus be resorted to in order to rectify unconscionability in a wide variety of different situations. This was an application of the Ramsden v Dyson principle based upon pragmatism, and not limited by deference to rules. The principle was applied to do justice as the dictates of individual cases required. It was applied in a manner not designed to lay down rules which could be seen as determining the future conduct of the courts and the course which the application of the principle was to take in the future. The basis of this application of the Ramsden v Dyson principle was the rectification of unconscionable situations and to

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2. (1880) 15 Ch. D. 96.

3. As per Lord Denning M.R. in Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd [1982] Q.B. 84 at page 122.

4. Ibid.

encumber the principle with rules would have most certainly limited its utility as a weapon to use in such situations. As yet no attempt has been made to specify unconscionability in accordance with rules. The concept would appear to be entirely a subjective judicial value judgment.

This is a situation which tends to favour the representee, that is usually the party seeking to rely upon the principle, and it has no doubt brought forth litigation which would not otherwise have seen the light of a court room.

At present the Ramsden v Dyson principle could be said to have arrived at a state of suspension. After a period of being applied in accordance with the dictates of pragmatism it has recently shown some signs of uncertainty as to what is likely to be its future direction. There are indications that the conception of Lord Denning M.R. as the proper role of the Ramsden v Dyson principle is not universally shared by the judiciary. Are we now to see a period of movement from pragmatism back to principles?

However the past ten years of development along the road of pragmatic application cannot be lightly cast aside. A number of very strong Court of Appeal precedents have been laid down, and the approach of Lord Denning has no doubt given the principle at least enough momentum to allow it to be pleaded to such an extent as to enable future development to be ascertained, and crystallised.

Whether or not the Ramsden v Dyson principle moves from a pragmatic application back to one based upon principles will depend largely upon the viability of unconscionability as a base for the principle. Can unconscionability be sustained in its present state? This issue will subsequently be considered in more detail. Before doing so, however, attention will be directed to the more basic issue of the enforcement of expectations and in particular the justification for the enforcement of expectations which are not based upon contract but are based upon gratuitous promises.

Theoretical Justification For the Enforcement of Non Contractual Expectations.

As has been indicated the Ramsden v Dyson principle provides a very effective weapon in the hands of the courts for the enforcement of non contractual expectations. It has also been indicated that, as the law appears to lie at present the basis upon which these non contractual expectations are enforced is that it would be unconscionable to the representee not to do so. But how do non contractual expectations differ from expectations arising from other causes and why ought the courts enforce non contractual expectations together with or in preference to the enforcementof expectations arising from other causes?

Should the courts enforce an interest arising from an expectation this means that they would endeavour to place the representee in as good a position as he would have been in had the representor performed his promise. This situation can be contrasted with two others. Firstly that where the courts enforce merely reliance interests whereby they endeavour to place the representee in as good a position as he was before the promise was made. Secondly that where the courts are concerned merely with enforcing a restitution interest. That is where the courts seek to prevent a representor from making an unjust reward from his promise by placing the parties in the same position that they would have been in before the representation or promise was made. It will be noted that in the latter two instances the courts are concerned to restore the status quo whereas if the courts enforce an expectation they actually give effect to the promise or representation and place the representee in a better position that he would have been in prior to the making of the representation.

The enforcement of an expectation deriving from the application of the Ramsden v Dyson principle clearly falls within his latter category. As has been indicated the principle is not basically concerned with restoring the status quo or with rectifying instances of unjust enrichment. It is directed towards the enforcement of expectations in cases where that expectation has been raised by the other party. This is clear from the fact

that the Ramsden v Dyson principle can extinguish the interests of the representor, in favour of substituting therefore the interests of the representee, in satisfaction of or protection of the expectation which the representor has created. If on the other hand it was clear that the effect of the Ramsden v Dyson principle was merely suspensory then it could be seen as protecting merely status quo interests rather than expectationary interests.

Now expectationary interests can be seen as deriving from two broad sources. Firstly there are those expectations which are bargain based. That is they derive from contract. Secondly there are those which are non contractual in nature, that is they derive from a gratuitous promise which would not be enforceable as a contract. It is this latter class which the Ramsden v Dyson principle can enforce. But should the law leave bargain promises and possibly those made under seal as the only binding promises and protect only the status quo interests for other detrimentally relied upon promises or should the law go further and fulfil expectations engendered by detrimentally relied upon gratuitous promises?

An examination of the cases reveals at least two instances where the fulfilment of non contractual expectations based upon a gratuitous promise would appear to have a perfectly rational base. There are those cases where the parties clearly intended to create legal relationships but where for some reason, possibly indolence, incompetence, lack of ability to obtain the services of a solicitor, or vagueness as to actual intentions, the promise is not encased in a form which is legally binding. [5.] In such instances the Ramsden v Dyson principle provides a machinery whereby such expectations may be given legal effect.

The decided cases reveal another much more general type of situation where the enforcement of non contractual expectations based upon gratuitous promises would appear to be justified. This is where the courts can be seen to be fulfilling a social welfare role. This element is evident in

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5. As in Greasley v Cooke (1980) 3 All E.R. 710; Crabb v Arun District Council (1976) 1 Ch. 179.

several cases where the Ramsden v Dyson principle has been successfully invoked. Thus we see the principle applied to prevent elderly women being deprived of their accommodation, [6.] to prevent a hard working young farmer being deprived of his land. [7.] This appears as a quite viable role for the principle in the area of domestic relations but if this policy of using the Ramsden v Dyson principle as a device to secure social welfare is continued then the realisation that cases will continue to be determined essentially upon their own facts will have to be accepted. This will mean that the cases decided will have little value from a precedent point of view. This could be acceptable in respect to domestic situations but would be a problem in respect to commercial situations where clear guidelines for future conduct may be demanded by the parties and by the commercial world in general.

Thus which non contractual expectations are fulfilled by the courts is very much a question of policy the answer to which will depend upon the assessment of the behaviour of the parties by the court as well as upon the general philosophy of the times. It could be argued that the advent of the welfare state has meant a tendency for the courts to construe promises widely. In the past the courts have tended to shun the protection of expectation interests because of clear laissez faire attitudes. Market forces have been behind the protection of bargain based expectations and such elements which could upset that protection, such as mistake, duress or misrepresentation have been very narrowly defined.

But what motivating forces can ensure that the courts will continue to protect expectations based not upon bargains but upon mere gratuitous promises? It could be that this will depend upon the extent to which the courts feel themselves free to become involved in people's lives and in particular to the extent to which the courts feel themselves free to redistribute property rights. Should there be a general move in society in

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6. As in Greasley v Cooke and Pascoe v Turner [1979] 1 W.L.R. 431.

7. As in Beech v Beech (High Court, Wellington 24 February 1982, (A No 144/80) Jefferies J.)

the direction of back to the unyielding protection of the legal rights to property which was evident in Victorian times it could be that the protection of non contractual expectations will wane.

The Viability of Unconscionability as a Basis for the Ramsden v Dyson Principle.

The evolution of a broad concept of unconscionability could serve to provide a quite tenable theoretical base for the principle. If unconscionability became clearly entrenched as the foundation stone for an action it would at least have the effect of driving out other possible bases, such as agreement, or fault, or fraud, which have occasionally, in the past, acted to confuse this principle with other heads of liability. Unconscionability could thus enable the Ramsden v Dyson principle to be kept theoretically 'pure!

Assuming unconscionability as the conclusively established basis for the action the representee would then be called upon to set up three requirements in order to successfully call the principle into aid. Firstly he would have to show that an expectation had been raised by the representor. Secondly he would have to show the requisite detrimental reliance. Having established these two requirements he would then have to show that it would be unconscionable that equity did not assert jursidiction and apply the Ramsden v Dyson principle.

The clear supremacy of unconscionability as a basis would mean that litigants would know that, in order to succeed in pleading the principle, they would have to direct their submissions and evidence to establishing unconscionability. Hence much of the mispleading which has been evident in recent actions could be eliminated. In particular pleading directed to satisfying the rules, such as whether there is the required state of knowledge to fulfil the probanda of Fry J.

Unconscionability would appear to be the only possibility as a common denominator if the principle is to be retained as a flexible weapon in

view of the wide variety and diverse situations which are likely to arise in contemporary society. Unconscionability does not place any situational limits upon the applicability of the Ramsden v Dyson principle. Unconscionability does not limit the courts in extending the principle.

Of course such a broad concept as unconscionability gives the courts a much greater scope within which to do justice as between the parties. The decided cases would generally appear not to be hortatory in judicial orientation in that they have shown a great concern with resolving the lis as between the immediate litigants as against laying down rules intended to be followed in subsequent cases. Unconscionability enables the courts to carve out a very wide area of discretion for themselves.

If a broad basis, resting upon unconscionability, for the Ramsden v Dyson principle, has some advantages, its inherent disadvantages are also obvious.

Habib Bank Ltd v Habib Bank AG Zurich could have amounted to Oliver L.J. being hoist with his own petard. His rueful comment, after having heard his dicta in Taylors Fashions v Liverpool Victoria Trustees Co Ltd read by counsel, to the effect 'I could wish that it had been more succinct ...' [8.] may have meant that he harboured some misgivings over the length of the pleadings. This tends to reveal what could be very real difficulties associated with unconscionability as a basis for the Ramsden v Dyson principle. But these problems are not new and, indeed, were anticipated over a century earlier by Lord Blackburn when, in reference to the issue of 'whether the balance of justice or injustice is in favour of granting the remedy or witholding it' he stated;

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8. [1981] 2 All E.R. 650 at page 666.

'The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry' [9].

Clearly if one discards rules which have been built up over the years and reverts to a broad principle of unconscionability the result could well be longer hearings with an even wider and deeper analysis of the facts of a case. If the phenomenon of unconscionability is subjective to the mind of the individual judge then counsel will be inclined to devise an endless procession of; presentation of interrogatories, argument, submission of evidence, deletions from pleadings and cross examination so as to demonstrate the unconscionability of their client's case to the court. Indeed this is what appears to have taken place in Habib Bank Ltd v Habib Bank AG Zurich, where, it appears answers were even 'extracted from counsel in a moment of exasperation' [10].

One problem which was highlighted quite vividly by the Court of Appeal decision is Pascoe v Turner [11] was that this broad approach has infused a substantial element of unpredictability into prospective litigation. It is clear that the plaintiff representor in that case would not have taken the action to appeal had he been aware of the ultimate result. [12] But there was little by way of precedent to guide him and if the courts are going to continue to exercise a wide discretion 'to do justice' in individual cases then surely a party against whom the principle is raised has the right to at least some indication as to how he is likely to fair upon an appeal. Does equity require justice to both the parties?

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9. As per Lord Blackburn in Erlanger v New Sombrero Phosphate Co (1978) 3 App Cas. 1218 at page 1280, cited with approval by Oliver L.J. in Habib Bank Ltd v Habib Bank AG Zurich [1981] 2 All E.R. at page 666.

10. [1981] 2 All E.R. 650 at page 668.

11. [1979] 2 All E.R. at page 666.

12. In Pascoe v Turner the female party had sought only a life interest in the property and the High Court found a constructive trust in her favour. But the Court of Appeal ordered the conveyance of the fee simple to the woman.

Unpredictability is likely to remain if emphasis is placed upon judgments based upon facts and inferences to be drawn from the facts. But Pascoe v Turner highlights yet a further problem which could be encountered and that is the extent to which the facts are extrapolated into the future and even into the realm of conjecture. It will be recalled that the Court of Appeal there considered the possibility relevant that the female party to the de facto relationship may, at some time in the future, desire to mortgage the property to order to obtain finance for repairs. [13.] But if such a judicial process is once engaged in where will it end? In Pascoe v Turner it would have been possible for the male party to the de facto relationship to argue that the promise of the house was a gift conditional upon marriage, and that the conduct of the representee in refusing his overtures of marriage was an equally relevant factor in the overall assessment of the unconscionability. It could have well been argued that in assessing unconscionability the Court of Appeal failed entirely to take into account the practicalities of the de facto relationship. The facts of any cases may well lend themselves not only to infinite. analysis but to endless fabrication and conjecture.

But as Pascoe v Turner illustrated the state of unconscionability pertaining to any given situation can be highly subjective to the representee. It is obvious that the state of unconscionability of a particular situation can well become quite beyond the control of one or even both of the parties. It would not be inconceivable that a party could, with astute legal advice, contrive a situation which he believed would secure his position in terms of the requirement of unconscionability. In other words he could, by his own conduct, render what was only a gratuitous promise by the representor binding. Reverting once again to Pascoe v Turner

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13. [1979] 2 All E.R. at page 951.

by way of illustration. The representee could have there deliberately engaged in expenditure upon the property in dispute with the specific intention of orienting the balance of unconscionability in her favour as against her having to relinguish the property. It is admitted that equity would never have assisted a representee who engaged in such conduct but a representor could well be faced with a difficult evidential problem in convincing a court as to the true motive underlying expenditure on property.

Many recent judgments appear to be nothing more than a rejoinder to pleadings. This is understandable where it is necessary to base pleadings upon facts and not upon legal principles. This has meant judgments which tend to be lengthly, prolix, and showing a remarkable tendency to incoherence with different points being emphasised as between one judgment and the next.

It could be contended that the move towards unconscionability represents a reversion to a past age, as well as to a past jurisdiction, when the common law and statute law was not able to provide the degree of protection which is possible today. The vastly more complex factual situations, together with the much greater volume of potential situations, which could arise today, would tend to make the apparent revival of the equitable jurisdiction in this area a highly dubious proposition. One could well pose the question whether it is appropriate that a jurisdiction which was initially devised to provide redress in cases where the primary jurisdiction was inadequate should not only be revived but should be permitted to evolve into something resembling a general residual head of liability. Thus unconscionability could be seen as giving judges a carte blanche to adjudicate upon disputes in accordance with their own ideas of justice. The principles of equity would once again become as long as the chancellor's foot.

In previous times the courts of chancery applied unconscionability with a robustness which would make the more circumspect judges of today hesitate. Holy Scripture was called into aid and unconscionability was

equated with sin, deserving of the wrath of the Almighty. But what can unconscionability be based upon in today's more moderate society? It is submitted that it is liable to gravitate to what appears as reasonable in the circumstances and so equate to the basis for at least some contract law. But this is likely to have different inflections in different circumstances. As indicated above social welfare factors have clearly been relevant in some recent decisions especially those of a domestic nature. To contemporary society social welfare is an acceptable value as a basis for action. This could continue as a basis for the determination of unconscionability in respect to domestic transactions but it would clearly not be a satisfactory basis for the determination of unconscionability in, say commercial transactions. To find what was reasonable in such cases the courts would probably view current commercial practice as well as utility and also would probably be inclined to take into account the likely consequences of a decision. Thus the basis for what amounted to unconscionability could vary as between different classes of factual situations.

So just as contract law has tended to move away from a strict reliance upon an assessment of whether or not there is agreement to an assessment of what is a reasonable interpretation of the contract so unconscionability could shift from having a moral base to one based upon what was reasonable in the light of current values in society as a whole in the specific circumstances. To place this in somewhat more specific terms; the courts would enforce the reasonable expectations deriving from a reasonable promise in what appeared to be the most reasonable manner in the circumstances.

From Pragamatism Back to Principles?

A vital issue for the future of the Ramsden v Dyson principle will be whether or not unconscionability can sustain itself as the basis of the principle. It is unlikely that such an obviously unruly concept will not be subject to some degree of taming in the future. It is reasonable to assume that like all large generalisations unconscionability will need and receive qualifications in practice.

It must be remembered that many of the cases so far determined under the Ramsden v Dyson principle have dealt with domestic situations and those which have concerned commercial matters have been such that they can be contained within their own facts; they have not had ramifications which have reflected into commercial practice to any significant extent. It is reasonable to assume that should a decision upon the Ramsden v Dyson principle be handed down, which had effects upon commercial practice, as for example in the field of bills of exchange, there would be a demand for clear rules which showed precisely the application of the principle. This could well prove imperative for the day to day practice of the commercial world.

Upon a more general basis it is reasonable to assume that there will be a move back to a period when control of the principle by means of the application of rules will be reached. But what form would the rules which controlled the future application of the Ramsden v Dyson principle take. It is possible to conceive of a balance being reached between the broad approach based upon unconscionability and that based more specifically upon the application of predetermined rules. It is not likely that the probanda of Fry J. will come back into favour by way of general application to the establishment of the right to call the principle into aid. This would probably be too restrictive for the modern courts and would greatly limit the degree of judicial discretion in the application of the principle.

What presents itself as a more probable option is that the standard of what is against conscience will become more or less canalised or defined, but that the juristic concept of unconscionability will remain in tact as the basis of the Ramsden v Dyson principle. That is unconscionability itself will be subject to limitations and more limited aspects of the principle, such as the conduct required of the representor will be left in a relatively rule free state. This would still enable a very broad judicial view to be taken of individual cases, but at the same time would not allow deserving cases to be denied the benefit of the principle because of non compliance with technicality.

The continued build up of precedent, especially an accumulation of decisions handed down by the Court of Appeal makes it inevitable that the broad approach will be subject to some limitations at least. It would seem therefore that the fundamentals of unconscionability will not be able to remain implicit for any great length of time in today's world. We are in the age of judge made law and it seems inevitable that no matter how compelling the facts of cases may be they must eventually take second place to an analysis in terms of prior decisions. As the decisions build up categorisation will continue and become more refined. However this could be dependent upon a possible restatement of the Ramsden v Dyson principle by the House of Lords and this is commented upon later.

Disengagement From Contract.

Whatever confusion may have existed in regard to the distinction between estoppel and contract as separate heads of liability can probably now be taken as finally dispelled.

Theoretically at least the distinction between the two is clear. Estoppel is based upon the concept of unconscionability, which in turn gives rise to an equity. Contract, on the other hand, is clearly based upon agreement, and what is more this agreement extends to the consideration for the offer. All the aspects of the contract, excepting

such eventualities as frustration etc, are within the contemplation of the parties at the time the contract is concluded. There must be a mutual intention to contract. This is not the case with estoppel. Estoppel arises generally in what might be termed the course of executory interaction. Its intervention or effect could well be quite beyond the wildest contemplation of the parties.

This is not to say that estoppel cannot arise within the execution of a contract so as to alter the course of that contract. It is true that estoppel may serve to secure what is an apparent agreement which is found to be defective in relation to the common law requirements. But it is submitted that generally estoppel has no place where the contractual liability is secure. There can be no place for an alternate liability in contract or estoppel. This, it appears, confused even the most august of tribunals in Siew Soon Wah v Yong Tong Hong [14]. where the Privy Council, in holding that there was a valid lease, went on to hold that there was an equity in favour of the defendant. The conclusion of the Privy Council merely served to confuse. To place the issue upon a fundamental, basis, if the plaintiff has a common law remedy he cannot revert to an equitable remedy.

Another case which was ultimately decided in estoppel but which caused confusion to some [15]. as to its potential to be determined in contract was Crabb v Arun District Council, decided in 1975, , where, it will be recalled, the representor had sold a piece of his land in the expectation that he would be granted an easement by the representor, from a proposed road to his existing land. At a meeting between the two parties the representee gained the impression that an easement would be granted. The representor constructed the road and initially left a gap in the boundary fence, ostensibly to provide for the intended easement. Later the gap was

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14. [1973] A.C. 836.

15. See e.g. Atiyah P.S. 'When is an Enforceable Agreement Not a Contract? Answer When it is an Equity' (1976) 92 L.Q.R. 174. also, in reply, Millett P.J. 'Crabb v Arun District Council - A Riposte' (1976) L.Q.R. 342:

closed and the representor council refused to grant the easement unless a substantial payment was made. The representee plaintiff sought to plead in estoppel rather than contract.

Two major difficulties apparently stood in the way of an action in contract. Firstly the 'agreement' could well have failed for uncertainty. But more important the representee would have experienced great difficulty in proffering the necessary consideration. While it is true that a detriment to the offeree can amount to consideration, and this could possibly have been found in the sale of the property, although even this is very doubtful, it could not be said that this had been agreed to by the other party.

Also while it is true that the conduct of the parties can be relevant in construing intention to contract, the representee could no doubt have made more of this conduct in respect to proving estoppel than to proving a contract. Assuming that the 'agreement' was uncertain the representee could use the subsequent conduct of the representor to secure the expectation without having to prove any agreement in respect to consideration. [16.]

Although in a few instances the dividing line between common law contract and estoppel may be very fine it is submitted that the broad drift of the two are still very much apart. In some respects they appear to be moving even further apart. The development of the Ramsden v Dyson principle and the evolution of acquiescence as a major factor in estoppel, has, it is claimed, no obvious counterpart in the common law rules of contract. While silence and merely standing by can operate to found an estoppel it would not be easy to sustain such conduct as evidence of an agreement sufficient to support a contract. The legistalure has intervened in common law contract to mitigate the rigours of inequality or bargaining power in the form of a mass

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16. The Law of Property Act 1925 (U.K.), and the absence of a written agreement may also have caused the representee some difficulty had he proceed in contract.

of legislation to protect consumers, and to do justice as between the parties. It is most unlikely that estoppel and contract will ever merge as a single head of liability. Estoppel is more likely to develop its main stream along its own lines but will continue to operate in those circumstances, where it considers it appropriate, on the outer fringes of the common law rules of contract. [17.]

To look at a few examples of the operation of estoppel in the creation or alteration of a contract; estoppel can serve to create an agreement when otherwise there would be no agreement; [18.] estoppel can render effect to a contract which would otherwise be void for mistake; [19.] estoppel could create an effective agreement out of a situation which would otherwise fail for uncertainty; [20.] estoppel can render effect to an agreement which would otherwise be ineffective through non compliance with statute. [21.]

Conclusion: Whither the Ramsden v Dyson Principle?

What is likely to be the future of the Ramsden v Dyson principle? An obvious deficiency in the present law relating to the Ramsden v Dyson principle is the absence of a definitive authority which can act as a benchmark authority. The existing Court of Appeal decisions tend to be in conflict with each other and an increasing volume of decisions from that Court could accentuate the problem. The time would thus appear to be opportune for a restatement of the Ramsden v Dyson principle by the House of of Lords. The comments made by Lord Hailsham L.C. in relation to the High Trees principle would appear to be equally appropriate to the Ramsden v Dyson principle;

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17. As e.g. in the development of the doctrine of part performance.

18. As in Smith v Hughes (1871) L.R. 6 Q.B. 597.

19. As in McGrath's Stock and Poultry Ltd. v McCullough [1981] 2 N.Z.L.R. 428.

20. As in Crabb v Arun District Council (1976) 1 Ch. 179.

21. As in Taylors Fashions Ltd. v Liverpool Victoria Trustees Co Ltd. (1982) 1 Q.B. 133.

> '... the time may soon come when the whole sequence of cases based on promissory estoppel ... may need to be reviewed and reduced to a coherent body of doctrine by the courts. I do not mean to say that they are to be regarded with suspicion. But as is common with an expanding doctrine, they do raise problems of coherent exposition which have never been systematically explored' [22].

Similar thoughts may have been in the mind of Lord Denning;

> 'The doctrine of estoppel ... has become overloaded with cases' [23].

The possibility therefore of a restatement of the principle by the House of Lords cannot be ruled out.

On the other hand it is somewhat difficult to see the direction which any restatement of the principle could take. One is tempted to draw an analogy with the restatement of the doctrine of part performance which was handed down by the House of Lords in Steadman v Steadman [24]. Restatement of part performance was facilitated by the simple reality of the presence of a contract upon which any rules could be made to focus. The Ramsden v Dyson principle is much more diffused in character and thus does not lend itself to such a simple resolution by such judicial codification.

An alternate possibility is the continued incremental development of the principle by means of continued Court of Appeal decisions. As indicated above this could prove difficult unless at least the rudiments of the principle become entrenched by consistent and persistent application. Conflicting Court of Appeal decisions would only serve to compound the existing confusion.

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22. Woodhouse AC Isreal Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] A.C. 741 at page 758.

23. Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd [1982] Q.B. 84.

24. [1976] A.C. 536.

It is possible that the future of the Ramsden v Dyson principle could be influenced by social and judicial attitudes to the redistribution of property rights. The propensity of the courts to use the principle as a basis for the redristribution of property rights has been very evident over the past twenty years. [25.] It could be assumed that moves towards the protection of the legal rights attaching to property would make the application of the Ramsden v Dyson principle less attractive.

With the present state of the case law the place of the Ramsden v Dyson principle in the field of estoppel appears to be quite secure. It appears to be more than capable of holding its own against estoppel by mere representation owing largely to its much greater scope. On the other hand it has not received the jolt which High Trees estoppel sustained in Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [26.] No alternate concept of estoppel based upon acquiescence has yet evolved.

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25. See under 'Remedies; Proprietary Rights Deriving From the Ramsden v Dyson principle' chapter nine supra.

26. [1972] A.C. 741.

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